Supreme Court, U.S.
FILED

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No. __-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

RED LAKE BAND OF CHIPPEWA INDIANS,
on its own behalf
and on behalf of its members;
GERALD F. BRUN; LUELLA R. BRUN,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
for the Eighth Circuit

January 10, 1996

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113 pp

QUESTIONS PRESENTED FOR REVIEW

1. May the meaning, interpretation, and construction of Indian treaties be determined without reference to fact finding concerning the intent and understanding of the Indian signatories of those treaties? *Choctaw Nation v. United States*, 318 U.S. 423 (1943); *Jones v. Meehan*, 175 U.S. 1 (1879); *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 568 (1979).

2. Did the Indian signatories to the Red Lake Chippewa treaties with the United States intend and understand that severance and the sale of timber within their lands, reserved for their exclusive use and occupancy, would be subject to taxation by the federal government?

3. Did the district court and court of appeals err by refusing to allow presentation of evidence as to the understanding of the Indian signatories to the Red Lake Chippewa treaties with the United States for the purposes of interpreting and construing the terms of those treaties and by granting summary judgment without considering such evidence? *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 568 (1979); Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

4. Do treaties between the United States' government and the Red Lake Band of Chippewa Indians allow the federal government to impose an income tax on the proceeds of the sale of tribally owned timber logged by a tribal member within the Red Lake Reservation? Treaty of Greeneville, 7 Stat. 49; Treaty of Old Crossing, 13 Stat. 667; Supplement to Treaty of Old Crossing, 13 Stat. 689; *Choctaw Nation v. United States*, 318 U.S. 423 (1943).

5. Does imposition of a federal income tax on income from tribally owned natural resources infringe upon Red Lake Chippewa tribal self-government under the facts of this case?

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D. Judgment In A Civil Case, U.S. District Court, District of Minnesota, dated August 29, 1994.

E. Order [Unpublished], U.S. Court of Appeals for the Eighth Circuit, dated August 10, 1995.

F. Order, U.S. Court of Appeals for the Eighth Circuit, dated October 12, 1995.

G. The Treaty of Old Crossing, 13 Stat. 667 (1863), *reprinted in* II C. Kappler 853, Indian Affairs, Laws and Treaties (2d ed. 1904).

H. The Supplement to Treaty of Old Crossing, 13 Stat. 689 (1864), *reprinted in* II C. Kappler 861, Indian Affairs, Laws and Treaties (2d ed. 1904).

I. The Treaty of Greeneville, 7 Stat. 49 (1795), *reprinted in* II C. Kappler 39, Indian Affairs, Laws and Treaties (2d ed. 1904).

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1. OPINIONS BELOW

Order, U.S. District Court, District of Columbia, dated September 24, 1992 (Appendix A hereto).

Order, U.S. District Court, District of Columbia, dated October 27, 1992 (Appendix B hereto).

Memorandum Opinion and Order, U.S. District Court, District of Minnesota, dated August 26, 1994 (Appendix C hereto).

Judgment In A Civil Case, U.S. District Court, District of Minnesota, dated August 29, 1994 (Appendix D hereto).

Order [Unpublished], U.S. Court of Appeals for the Eighth Circuit, dated August 10, 1995 (Appendix E hereto).

Order, U.S. Court of Appeals for the Eighth Circuit, dated October 12, 1995 (Appendix F hereto).

2. STATEMENT OF SUPREME COURT JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C § 1254(1). The U.S. Court of Appeals for the Eighth Circuit's substantive order was issued August 10, 1995 (Appendix C hereto). The Court of Appeal's order denying petitioner's request for rehearing was entered October 12, 1995 (Appendix F hereto). The Court of Appeal decided federal questions concerning the implementation of the federal income tax and the interpretation and intent of treaties between and Indian tribe and the United States government in a way which conflicts with applicable decisions of this Court.

3. TREATIES AND STATUTES INVOLVED

1. The Treaty of Old Crossing, 13 Stat. 667 (1863), *reprinted in* II C. Kappler 853, Indian Affairs, Laws and Treaties (2d ed. 1904) (hereafter "C. Kappler") (Appendix G hereto).

2. The Supplement to Treaty of Old Crossing, 13 Stat. 689 (1864), *reprinted in* II C. Kappler 861, Indian Affairs, Laws and Treaties (2d ed. 1904) (Appendix H hereto).

3. The Treaty of Greeneville, 7 Stat. 49 (1795), *reprinted in* II C. Kappler 39, Indian Affairs, Laws and Treaties (2d ed. 1904) (Appendix I hereto).

4. 26 U.S.C. 1(a)

> (a) MARRIED INDIVIDUALS FILING JOINT RETURNS AND SURVIVING SPOUSES. -- There is hereby imposed on the taxable income of --
>
> (1) Every married individual . . . a tax determined in accordance with the following table:
>
> . . .

4. STATEMENT OF THE CASE

4.1 Introduction.

This case involves the meaning of Indian treaties and the right of present day Indians to receive the benefits of those treaties. Specifically at issue is the right of the Red Lake Chippewa people to harvest tribal timber free of imposition of the federal income tax. This court has determined that no income tax shall be imposed on the timber revenues received by an individual Indian from timber harvest on his **individual** land. *Squire v. Capoeman,* 351 U.S. 1 (1956). Here, it is **tribally** owned timber which is harvested by tribal members Gerald and Luella Brun (Petitioners Brun). The Red Lake Band reserved that timber for the beneficial use of its people in the Bands' treaties with the United States and which the Band maintains reserved the use of tribal natural resources free from taxation.

4.2 Jurisdiction Below.

The District Court had jurisdiction over the Brun petitioners' claims pursuant to 28 U.S.C. § 1331, in that the matter in controversy arises under the Constitution and laws of the United States; pursuant to 28 U.S.C. § 1361, in that it is in the nature of mandamus to compel officers and employees of an agency of the United States to perform duties owed to the Brun petitioners; and pursuant to 28 U.S.C. §§ 1340 and 1346, in that district courts have original jurisdiction for any civil action against the United States as defendant for recovery of any internal revenue tax which has been erroneously or illegally assessed and collected against the Brun petitioners.

The Bruns paid the taxes assessed and met all statutory and regulatory requirements for filing their complaint for refund. 26 U.S.C. § 7422. [1]

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[1] The Bruns filed a refund claim for 1983 in the amount of $22,944.06, more than six months prior to the filing of the action below. The Internal Revenue Service, by letter dated April 23, 1990, notified petitioners Brun that their claim for 1983 was denied.

The Bruns filed a refund claim for 1984 in the

The Court of Appeals had jurisdiction under 28 U.S.C. § 1291 providing that courts of appeal shall have jurisdiction of all appeals from all final decisions of the district courts of the United States. The district court entered a final order dismissing the complaint on August 26, 1994, and a judgment on August 29, 1994. The Notice of Appeal, dated October 13, 1994, was filed with the district court on October 20, 1994, within the 60 days required by statute where the United States is a party. Fed. R. App. P. 4.

4.3 Summary of the Case.

The Red Lake Band of Chippewa Indians (hereinafter "the Band") is the political successor in interest to the Red Lake Band of Chippewa Indians which executed two treaties with the United States government. *I.e.*, the Treaty of Old Crossing, 13 Stat. 667 (1863), *reprinted in* II C. Kappler, Indian Affairs, Laws and Treaties 853 (2d ed. 1904) (hereafter "C. Kappler"), Appendix G; and the Supplement to Treaty of Old Crossing, 13 Stat. 689 (1864), *reprinted in* II C. Kappler 861, Appendix H.

In addition, the Treaty of Greeneville covered lands occupied by the Band (Treaty of Greeneville, 7 Stat. 49 (1795), *reprinted in* II C. Kappler). Declaration of Melissa Meyer, Ph.D., dated May 27, 1994, (Filed with the District Court) pp. 3-5 (hereinafter "Meyer Decl.")(Appendix J).

Article V of the Treaty of Greeneville explicitly reserves to the Band the right to quiet enjoyment of certain lands:

> To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the

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amount of $9,024.45, more than six months prior to the filing of the action below. The Internal Revenue Service, by letter dated April 23, 1990, notified petitioners Brun that their claim for 1984 was denied.

The Bruns filed a refund claim for 1985 in the amount of $4,608.74, more than six months prior to the filing of the action below. The Internal Revenue Service later disallowed the Brun petitioners' claim for refund.

> meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States. . . . [Until the Tribes' lands are sold to the United States,] the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States . . . .

Treaty of Greeneville, art. V, II C. Kappler at 42.

Since "these lands" include the areas inhabited by the Red Lake Band, the Band is clearly a beneficiary of that clause. *See, Jourdain v. Commissioner*, 617 F.2d 507 (8th Cir. 1980).

The purposes of these treaties were to provide a homeland for tribal members within which the Band could determine tribal governmental policies and prerogatives.

Uncontroverted evidence presented by petitioners demonstrated that Red Lake Chippewa leaders would not have intended that tribal resources be taxed.

As a result of those treaties and subsequent executive orders and acts of Congress, the Red Lake Band today inhabits its reservation on ancestral grounds.

Petitioners Brun are enrolled members of the Red Lake Band and reside on the Red Lake Indian Reservation in the State of Minnesota. As such they are the beneficiaries of the rights guaranteed by treaty.

Pursuant to a tribal policy and permitting system, appellant Gerald Brun cut, skidded and hauled logs to a buyer in 1983, 1984, and 1985. The Internal Revenue Service assessed taxes on the income produced by that activity. The Bruns paid the taxes under protest and brought timely suit for refund in the federal district court.

This case was originally filed in the United States District Court for the District of Columbia (Cause No. 92-0976). It was brought by petitioners Red Lake Band of Chippewa Indians on its own behalf and as *parens patriae* on behalf of its members for

declaratory judgment and other relief. Petitioners Brun also sued on their own behalf seeking a tax refund and other appropriate relief.

In the Complaint, the documents presented and the expert testimony, The Band and Petitioners Brun demonstrated that the harvest of tribal forest products provides benefits to the members of the Band.

A federally approved timber cutting permit is the primary instrument used to sell tribal timber on the Red Lake Diminished Reservation. On the Diminished portion of the Red Lake Reservation, only tribal members may be granted a permit to harvest and sell timber.[2]

Under this permitting system, the Brun petitioners purchased from the Bureau of Indian Affairs Forestry Agent (Red Lake Agency) tribal stumpage located on the Red Lake Reservation and cut, skidded, and hauled the logs to a buyer. Complaint. ¶ 5.13.

Revenue from timber sales is vital to the Band, for it allows the Band to provide essential governmental services to its members residing on the Reservation. Complaint. ¶ 5.7.

Natural resources still serve as the basis for virtually all non-governmental employment on the Red Lake Reservation. Meyer Decl., Appendix J, p. 74a.

The Red Lake Reservation economy still relies heavily on natural resources upon which the people have relied for generations, including timber. *Id.*

Until relatively recently, tribal sawmills have served as a source of reservation income for more than fifty years providing nearly one-third of the non-public employment on the reservation. *Id.*, p. 75a. As sawmill operations have declined, tribal members,

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[2] *See, e.g.,* U.S. Department of Interior, Bureau of Indian Affairs, Red Lake Agency, "Policy Statement for Cutting of Forest Products Under Permit on Lands of the Red Lake Band of Chippewa Indians (FY 1981)", originally submitted as an exhibit below.

like the Bruns, have come to rely more on the older tradition of individual timber sales. *Id.*, p. 76a.

Commercial rice operations in other states have depressed that agricultural enterprise increasing the dependence on other natural resources such as timber. *Id.*

Economic conditions at Red Lake fall below the national average for Indians. The average unemployment rate approaches, and seasonally surpasses, fifty percent. The average per capita income falls below the poverty level. *Id.*, p. 30.

None of these facts were controverted by the United States.

By order dated September 24, 1992, the district judge granted a motion to dismiss brought by the federal government on the grounds that, (a) venue was improper for Petitioners Brun' refund claim and, (b) the court lacked jurisdiction over the Band's claims under the Declaratory Judgment and Anti-Injunction Acts. Upon reconsideration, the order dismissing petitioners Brun' refund claim was vacated and the matter was ordered transferred to the District of Minnesota on October 27, 1992. Appendix B.

By clerk's notice of November 25, 1992, the transfer was completed. The dismissal of the Band's actions was not appealed nor transferred and no issue is presented here concerning that dismissal.

After transfer to the district court in Minnesota, a motion for summary judgment was filed by defendant United States on January 24, 1994. On August 26, 1994, the district court granted that motion and dismissed the complaint. Appendix C.

A timely appeal was filed with the Court of Appeals for the Eighth Circuit.

In its opinion of August 10, 1995, the Court of Appeals issued a ruling finding, that as a matter of law, federal income tax applied to income generated from tribal timber resources on the Red Lake Reservation when such resources were logged and sold by an individual member of the Red Lake Chippewa Band pursuant to tribal permission. Appendix E.

A timely petition for rehearing was filed with the Circuit Court requesting review *inter alia*, on the basis of *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214 (1995). That decision was decided on June 14, 1995, too late to be considered by the Court of Appeals since the case had been submitted on June 12, 1995. The petition for rehearing was denied on October 12, 1995. Appendix F.

5. ARGUMENT

5.1 Introduction.

In its opinion of August 10, 1995, the Court of Appeals did not follow the analysis mandated by existing law nor by the latest decision of the United States Supreme Court concerning treaty rights and taxation. *See, Oklahoma Tax Commission v. Chickasaw Nation,* 115 S.Ct. 2214 (1995).

The Court's decision conflicts with applicable decisions of this Court concerning well known principles of treaty construction, including the tenet requiring determination of the intent of a treaty, by refusing to require the court below to hold a hearing, consider anthropological and historical evidence, and take other evidence concerning the intent of the treaty signers.

The intent of the Chippewa Indian signers of the treaties is central to such a determination. The court below refused to determine that intent, contrary to established Indian law principles and decent decisions of this Court including *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214 (1995).

Finally, the Courts below decided summary judgment issues in conflict with applicable decisions of this court.

5.2 The Court of Appeals Decision Violates Well Established Rules of Treaty Construction.

On June 14, 1995, this Court decided *Oklahoma Tax Commission v. Chickasaw Nation, supra*. That case involved two state taxes. The first, a motor fuels tax on the retail sales of fuel sold by the tribe, is not involved here, nor does the reasoning involved in that case have application here. The second tax was a state income tax on the wages from tribal employment of an

Indian working on the reservation but residing in the State of Oklahoma outside of Indian country. The reasoning of the court as to the second tax follows existing practice and reinforces it. The courts below failed to utilize this analysis.

The Supreme Court's decision concerning imposition of an income tax was by a split five-to-four vote. The majority held that Oklahoma could impose its income tax on its resident, even though that resident was an Indian whose wages came from reservation income. It is the analysis by which both that majority, as well as the dissenting minority of four, analyzed the case which is instructive to the case at bar.

The majority, while citing rules concerning income taxation of residents by a sovereign authority, also went on to analyze the Treaty of Dancing Rabbit Creek involved in that case. Treaty of September 27, 1830, 7 Stat. 333-334. That treaty, like the treaties involved in this case, had no language whatsoever about taxation. The Treaty of Dancing Rabbit Creek did, however, provide that the Chickasaw Nation was promised ". . . that no territory or state shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People and their descendants . . . but the U.S. shall forever secure said [Chickasaw] Nation from, and against, all [such] laws . . ." *Oklahoma, supra*, p. 2223. The court evaluated that argument and applied the rule of liberal construction. *Oklahoma, supra,* at p. 2224, *citing County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985). In finding no exemption, the court noted that the treaty had a "clear geographic limit" and, therefore, the subject clause did not apply to persons who lived outside the Chickasaw Nation's limits.

More importantly, however, for our purposes, is the fact that the Court engaged in an analysis of treaty intent and purpose. The court considered what the intent and the purpose of the treaty was and made a finding concerning the treaty that the "purpose of the Treaty was to put distance between the Tribe and the States." *Oklahoma, supra,* p. 2224. In so doing, the court cited historical materials and information. *Id.* Thus the majority, while finding against the tribe on the merits of state taxation, applied precisely the analysis requested by the Red Lake Band and the Bruns in this case, namely, that it is necessary to find the purpose and intent of a treaty from historical materials, even though a treaty has no explicit language concerning taxation.

The dissenting minority of four[3] also made it clear that the "issue is whether such a tax falls within the scope of a promise this Nation made to the Chickasaw Nation in 1837 . . ." *Oklahoma, supra,* p. 2225. The minority also reviewed historical materials to find out what the intent of the treaty was. The minority found that the "language of the promise, read broadly and in light of its purpose, fits the tax at issue." *Oklahoma, id.* The minority also cited the well known rules of treaty construction, including *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 247 (1985). *Oklahoma, supra,* p. 2226.

Thus, although a majority of the court came to a different view on the merits of what the intent and purpose of the treaty was, all nine justices agreed on the analysis to be conducted, namely resort to historical materials to construe the intent of the treaty, even though there was no facial ambiguity nor specific nor implicit terms in the treaty concerning tax matters.

The Courts below failed to undertake such an analysis in this case, and this constitutes error. The intent of the treaty signers, and the treaty's underlying purposes, must be investigated by the court before a decision on the intent of the treaty can be rendered that is consistent with the ruling in *Oklahoma, supra.*

Since before Euro-American immigration, members of the Red Lake Band of Chippewa dwelled upon the lands which were reserved by the Band in its treaties with the United States. The timber located on those reserved lands provided economic benefits to tribal members.

Subsequent to the execution of the treaties and acts of Congress and the President, and in reliance thereon, members of the Band continued to harvest timber for subsistence and commercial purposes upon tribal lands. Such timber harvesting provided and still provides an important part of the subsistence and livelihood for tribal members.

Properly interpreted, it is clear that the Indian signers to the treaties did not intend that use of natural resources, such as forests, would be taxed by the very government that was

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[3] Opinion by Breyer, J., with whom Stevens, O'Connor and Souter, JJ., joined.

guaranteeing continued use of these resources. Properly interpreted, the Internal Revenue Code (26 U.S.C. § 1 and § 11) does not impose income tax on income derived from timber harvesting by Band members. Thus, imposition of income tax on petitioners Brun income, derived from those resources is a violation of their treaty rights and prohibited by law.

5.3 The Rules of Treaty Construction.

Over the years, this Court has determined rules for the interpretation and enforcement of treaties between the United States government and American Indian tribes. Applying these principles makes it abundantly clear that the treaties involved here must be construed to avoid taxation of income generated by harvest of the tribe's natural resources. Among these principles are the following:

The Indians held all natural resources prior to white colonization. Thus, as a general matter, the treaties do not represent a grant of rights from the United States to the Indians. Instead they constitute "a grant of rights from . . . [the Indians and] a reservation of those not granted." *United States v. Winans*, 198 U.S. 371, 381 (1905).

A treaty is to "be construed, not according to the technical meaning of its words to learned lawyers, but in a sense in which they would naturally be understood by the Indians." *Washington v. Fishing Vessel Association*, 443 U.S. 658, 675 (1979), citing *Jones v. Meehan*, 175 U.S. 1, 11 (1879). The Supreme Court has regularly used these canons of construction to broadly interpret the rights accorded to Indian tribes by the Treaties. *See United States v. Winans*, *supra*; *Seufert Bros. Co. v. United States*, 249 U.S. 194 (1919); *Tulee v. Washington*, 315 U.S. 681 (1942); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, *supra*, 443 U.S. at 676, 679.

Rights guaranteed by treaty are property rights and may not be taken except by explicit decision of the United States Congress and with full compensation. *See, United States v. Sioux Nation*, 448 U.S. 371 (1980); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Winnebago Tribe of Nebraska*, 542 F.2d 1002 (8th Cir. 1976); *See, also, Menominee Tribe v. United States*, 391 U.S. 404, 413 (1968); *Hynes v. Grimes Packing Co.*, 337

U.S. 86, 105 (1949); *Whitefoot v. United States*, 293 F.2d 658, 659 (Cl. Ct. 1961).

The Supreme Court has held that intent of the Indian signers is crucial:

> A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. E.g., Lone Wolf v. Hitchcock, 187 U.S. 553. When the signatory nations have not been at war and neither is the vanquished, it is reasonable to assume that they negotiated as equals at arm's length.
>
> . . .
>
> Accordingly, it is the intention of the parties, and not solely that of the superior side, that must control any attempt to interpret the treaties. When Indians are involved, this Court has long given special meaning to this rule. It has held that the United States, as the party with the presumptively superior negotiating skills and superior knowledge of the language in which the treaty is recorded, has a responsibility to avoid taking advantage of the other side.

Washington v. Fishing Vessel Association, 443 U.S. 658, 675 (1979)

It is axiomatic that Indian treaties, statutes, agreements and executive orders are to be construed liberally in favor of the Indians. *See*, *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912). This doctrine of construction requires that ambiguities in the language of these documents be resolved in favor of the Indians. *See*, *McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). In addition, violation of Indian treaties is a constitutional matter, *infra*, § 2.5.

5.4. The Precepts of Treaty Interpretation Do Not Require a Facial Ambiguity.

Refusing to delve into the intent and understanding of the signatories to the Chippewa treaties, the lower courts accepted the government's argument that there is a special rule when taxation matters are involved, namely that there must first be an ambiguity before the precepts of interpretation are applied. Thus, the Court of Appeals looked in vain for "treaty language which

conferred an income tax exemption . . . ." *See,* Opinion of August 10, 1995, p. 4. Appendix E hereto.

But, there is no special rule involving the need for ambiguity before the precepts of treaty interpretation and construction can be applied. As best stated in Felix S. Cohen's Handbook of Federal Indian Law:

> In construing Indian treaties, the courts have required that treaties be liberally construed in favor of Indians, that ambiguous expressions in treaties must be resolved in favor of the Indians, and that treaties should be construed as the Indians would have understood them. These precepts represent an acknowledgment of the unequal bargaining position, based partially on the United States' superior negotiating skills and knowledge of the language. One consequence of this is that many important protections have been held by the courts to be reserved implicitly by the treaties.

Felix S. Cohen's Handbook of Federal Indian Law, p. 222 (Renard Strickland ed., 2d ed. Michie 1982)(footnotes omitted).

Clearly, construing ambiguities is but one of the applications of the general concept of liberal interpretation favoring the Indian intent. And, this Court has made it clear that analysis of a treaty intent and purpose is required, even though there is no "treaty language conferring an income tax exemption." *Oklahoma, supra.*

Applying the rules of liberal construction and the need to ascertain the intent of the Indians has led the courts to imply the existence of reserved water rights (*e.g., Winters v. United States*, 207 U.S. 564 (1908)), the right to hunt and fish (*e.g., Menominee Tribe v. United States*, 391 U.S. 404 (1968)), and the reservation of tribal self-government free of state jurisdiction (*e.g., McClanahan v. Arizona State Tax Comm'n.*, 411 U.S. 164 (1973)). *See,* Handbook *supra*, at 223.

In most, if not all, of these cases, there has been no "ambiguity" which has led the court to look into the Indian intent in signing the treaties. Indeed, the documents concerned in those

cases, generally failed to mention, at all, these important rights, just as the Treaty of Dancing Rabbit Creek involved in *Oklahoma* failed to mention taxation. The Treaty of Dancing Rabbit Creek provided that ". . . no territory or state shall ever have a right to pass laws for the government of the [Chickasaw] Nation of Red People . . ." *Oklahoma Tax Commission v. Chickasaw Nation, supra,* p. 2223. Here, the Treaty of Greeneville provides that the Tribe shall have a right to certain lands and to "quietly to enjoy them . . . without any molestation from the United States . . ." Treaty of Greeneville, art. V, II C. Kappler at 42. Obviously, the language of the Treaty of Greeneville is no more or less ambiguous than the language of the Treaty of Dancing Rabbit Creek. Just as there was no need to find explicit language discussing taxation in *Oklahoma* there is no need to find language here discussing taxation.

The Court of Appeals' insistence that it must "find" Treaty language which infers an income tax exemption is simply incorrect and contrary to the teaching of *Oklahoma*. The rights in *Winters, Menominee* and *McClanahan* were implied from the surrounding facts and the intent of the signers. Freedom from taxation is no less important than these rights. Yet the Court applies a different rule to taxation to find that the intent of the treaty signatories and the understanding of the Indians, can be delved into only if there is a specific provision which somehow mentions taxation and which is somehow ambiguous so that the Court's inquiry can be triggered.[4] There is no such rule. Rather, there are several "precepts" which, taken together, mandate inquiry into the Indians' understandings of the treaty.

In the leading case of *Choate v. Trapp*, 224 U.S. 665 (1912) this Court applied the precepts of interpretation to a real life situation. There, the state argued that tax exemptions should be strictly construed and that such an exemption would be withdrawn at any time the government saw fit. *Choate, supra*, at 675.

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[4] Indeed, in the leading case of *Squire v. Capoeman*, 351 U.S. 1 (1956), the Supreme Court found an implied tax exemption as to income where land was to be preserved "free of encumbrances." There was no mention of taxation in the statute at question.

The Court rejected this view ruling:

> . . . but in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than one hundred years, and has been applied in tax cases.

Choate, supra, at 675.

There was nothing ambiguous involved. Rather, it would have been a violation of the precepts of Indian treaty and statutory interpretation for the court to interpret the statute "in favor of" the United States. *Oklahoma* makes it clear that the treaties involved here must be viewed in a light most favorable to the Tribe.

Here, there is no express language in the treaties which is inapposite to the interpretation proposed by the Red Lake Band. Indeed, the treaty is silent in its terms as to taxation, as was the Treaty of Dancing Rabbit Creek in *Oklahoma*. Would the Chippewas have ceded their vast lands and agreed to repair to the relatively small reserved areas had they known that the resources of that reservation would be taxed? Almost certainly not. The treaty is silent on its face as to what the intentions were concerning taxation. Given this silence, it is not only permissible but mandated that the Court inquire as to the intention of the signatories to the treaty.

5.5. The Chippewa Understanding of the Treaties.

At the time of the signing of the Treaties, the Indians understood that an integral part of the right to dwell upon their lands included the right to harvest timber growing upon tribal land in order to provide material for homes, shelters, and other buildings and to provide for fuel. No federal income tax existed

and thus was not contemplated by either the United States government or the signatory tribes. *See* House Ways and Means Committee, Tax Treatment of Indian Fishing Rights Income, H.R. Rep. No. 312 Part 2, 100th Cong., 2d Sess., at 4 (1988).

It is clear that Indians would have never imagined that a recognition of their sovereignty by treaty would somehow be construed as bestowing a right to the United States to tax the income of tribal members derived from their harvest of tribal resources. *See*, Declaration of Melissa Meyer, Ph.D., (hereinafter "Meyer Decl."), Joint Appendix, p. 52a. Because use of natural resources was a critical right, it is clear that no Red Lake leader at treaty times would have understood that ceding land and entering into sovereign treaty relations with the United States would allow the government to tax such income. Meyer Decl., *supra*, p. 79a. The United States offered no evidence to the contrary in the court below.

The Chippewas also understood that their reservation was a homeland where they could dwell free from interference. The Red Lake Reservation, like many other reservations in the United States, is a result of treaties, executive orders and congressional acts. *See*, *United States v. Minnesota*, 466 F.Supp. 1382 (D. Minn. 1979). After the 1864 Treaty of Old Crossing, 13 Stat. 667 (1864), the Red Lake Reservation consisted of about 3.2 million acres. *Id.*, p. 1383. It is without question that rights to exclusive possession of the reservation, including use of its natural resources, are the same whether those reservations were created pursuant to treaty, statute or executive order. *See* Felix S. Cohen's Handbook of Federal Indian Law, p. 493 (Renard Strickland ed., 2d ed. Michie 1982) (herein after "1982 Handbook"). The United States points to no fact nor legal standard which would reduce these rights.

Indian tribes enjoy full equitable ownership of timber located upon tribal reservation lands. *United States v. Algoma Lumber Co.*, 305 U.S. 415, 420 (1939). This is true whether or not the treaty or other basis on which the tribe's reservation was established mentions timber. *United States v. Shoshone Tribe*, 304 U.S. 111 (1938). Indian tribes generally may not sell or otherwise alienate the timber on their lands without approval of the Secretary of the Interior. 1982 Handbook, *supra*, p. 539. *See also*, 25 U.S.C. §§ 461-479. Tribes have the power to prevent the sale or distribution of tribal assets and may manage, operate and

dispose of tribal property. *See, generally*, 1982 Handbook, p. 539-540; 25 U.S.C. §§ 476-477. Sale of tribal timber requires tribal consent as well as approval of the Secretary of the Interior. 25 C.F.R. § 141.7(a) (1980).

The imposition of federal income tax on an individual Indian harvesting tribal timber would clearly frustrate the purpose and nature of the reservation, and the Indian understanding of the treaty, thereby violating its implicit terms. Applying the rules of construction noted above to the Internal Revenue Code would not yield the conclusion that taxes were to be imposed thereby greatly diminishing the value of the reservation. It is clear that the canons of construction are to apply not only to treaties but that other "federal statutes as well are to be construed so far as is reasonable to do in favor of Indians." *Reich v. Great Lakes*, 4 F.3rd 490, at 492 citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766-68 (1985); *EEOC v. Cherokee Nation*, 871 F.2d 937 at 939 (10th Cir. 1989).

5.6. Authority Relied On By the Courts Below Are Inapposite to the Current Case.

The lower courts' reliance on *Jourdain v. Commissioner*, 617 F.2d 507 (8th Cir. 1980) is misplaced. [*See, e.g.,* Aug. 10 Opinion, App E., p. 23a] There is no indication that either the district court nor the court of appeal in that case was ever presented with any evidence whatsoever as to what the Red Lake Band's understanding of the Treaty of Greeneville was nor their intent in signing it. There is virtually no discussion in that case of the Treaty of Old Crossing, 13 Stat. 667 (1863), *reprinted in* II C. Kappler 853, and the Supplement to the Treaty of Old Crossing, 13 Stat. 689 (1864), *reprinted in* II C. Kappler 861. Nor does there appear to have been any evidence presented as to Indian understanding and intent with regard to those treaties. In this case, petitioners submitted substantial evidence as to the Indian understanding of the treaty. *See*, Meyer Decl.,Appendix J. The government offered nothing. Yet, this Court has repeatedly reaffirmed the need to determine the intent and purpose of Indian Treaties. *Oklahoma, supra.*

Here, imposition of a tax violates federal policy. If the income in question were earned by petitioners from their own trust allotment rather than from tribal trust land, then the income would be exempt. *Squire v. Capoeman*, 351 U.S. 1 (1956). In

Squire, the court found an implied exemption by virtue of the General Allotment Act even though the income tax statute contains no exemption for income earned from an allotment.

If the timber had been logged by the Band itself and a share of revenues then paid to the Bruns as a per capita payment, then the income would also be tax exempt. Pub. L. 98-64, 25 U.S.C. § 117; § 1407.

If the Band had done the logging and kept the income for itself, the income would not be taxable because IRS has determined that tribes are not taxable entities despite the fact that the I.R.C. contains no such rule. *See*, Rev. Rul. 94-12.

Thus, it is only because the Bruns directly received the income, that Internal Revenue Services deems it taxable. This makes no sense and violates clear federal policy.

5.7 The Court Below Violated Supreme Court Standards for Summary Judgment Under Rule 56.

The United States did not meet the requirements for summary judgment and the district court grant of judgment and subsequent affirmance by the Court of Appeals were error. The standards for a grant of summary judgment are well known. Summary judgment is proper:

> [I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

Summary judgment should not be granted where the "moving parties' submissions have not foreclosed the possibility of the existence of . . . facts from which 'it would be open to a jury . . . to infer from the circumstances' that [the non-moving party's allegations are correct]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986) (quoting *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

In this case, a material fact is the intent of the Indian signatories to the treaties of cession. Applying the canons of construction and applicable law, it is clear that those treaties must be construed in the light most favorable to the Indians and in line with their understandings. Petitioners Brun supplied substantial evidence that the understanding of the Indians would not have been to allow the United States to tax harvest of tribal natural resources. *See generally*, Meyer Decl., Appendix J. To the extent this was controverted by the United States, it is a genuine issue as to a material fact. The government offered no contradictory evidence. The Band, as non-moving party presented evidence in its favor and any reasonable doubts should have been resolved against the government as the moving party.

A party opposing summary judgment is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence for the purpose of defeating summary judgment. *Ramsouer v. Midlin Valley*, 135 F.2d 101 (8th Cir. 1943). On appeal from an order granting a defendant's motion for summary judgment, the circuit court of appeals must give the petitioners the benefit of every doubt. *Walling v. Fairmont Creamery Co.*, 139 F.2d 318 (8th Cir. 1943).

Summary judgment is not to be granted merely because the moving party appears likely, or even very likely, to prevail at trial; the summary judgment procedure is reserved for cases where "material facts are so clear that trial would be an empty exercise in formalism." *See also*, *Washington Post Co. v. Keogh*, 365 F.2d 965 (D.C. Cir. 1966) ("courts must be ever careful to grant summary judgment only when no issue of fact is controverted or turns upon choice between permissible inferences from undisputed evidence").

The court merely determines whether there are any genuine factual issues relevant to the legal issues in dispute that "may be reasonably resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 255. Moreover, as the court assesses the case for that limited purpose "[t]he evidence of the nonmovant is to believed, and all justifiable inferences are to be drawn in his favor. Id. (emphasis added). Thus:

> In assessing a motion for summary judgment, all inferences to be drawn from underlying facts must be viewed in light most favorable to the party

> opposing the motion; indeed, the record must reveal that the party opposing the motion would not be entitled to prevail in any discernible circumstances.

Kreuzer v. American Academy of Periodontology, 735 F.2d 1479 (D.C. Cir. 1984). *See also*, *Masson v. New York Magazine, Inc.*, 111 S.Ct. 2419 (1991); *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990); *Shields v. Eli Lilly & Co.*, 895 F.2d 1463 (D.C. Cir. 1990).

To survive respondent's motion, the petitioners "need only present evidence" which might lead to a judgment in his favor. *Anderson, supra.* at 255; *Commercial Union Insurance Co. v. Schmidt*, 967 F.2d 270 (8th Cir. 1992). Reasonable doubts touching the existence of genuine fact must be resolved against the movant. *United States v. Farmers Mutual*, 288 F.2d 560 (8th Cir. 1961).

Even if the moving party has made out a case that would authorize a grant of summary judgment, a court need not grant the motion if for any reason the fairer course is to proceed to trial rather than resolve the case on motion. *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). This Court has specifically applied this rule to preclude summary judgment for the United States in cases involving the status of Indian land. *Arenas v. United States*, 322 U.S. 419 (1944). Here, a fairer course would be to inquire as to the Indian intent in signing the treaties.

The burden of establishing the nonexistence of a genuine issue of material fact was on the government as the party seeking summary judgment. Fed. R. Civ. P. 56(c). The party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings and other materials which it believes demonstrate the absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317 (1986).

In this case, the government offered no hint as to how it would meet the requirements of the rule. The government did not argue that no issues of material fact existed nor did it identify which of the Petitioners claims were inadequate. The government simply argued that the Petitioners' claims could not prevail as a

matter of law. This is incorrect, as correct interpretation of the treaties is a central and material fact to this dispute.

Even had the government made a prima facia showing either evidence negating an essential element of the Petitioners claims or that the Petitioners evidence was insufficient to establish an essential element, it failed to carry its burden of persuasion under Rule 56.

Assuming arguendo that the government carried its burden of proof, it still did not carry its burden of persuasion because the Bruns established, on the record, the existence of sufficient evidence to indicate the existence of genuine issues of material fact. *See generally*, Meyer Decl.; Appendix J. Only if a moving party carries its initial burden of persuasion under Rule 56, does that burden shift to the non-moving party, who must either rehabilitate the evidence attacked in the moving party's papers, produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e) or submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). *Celotex*, 477 U.S. at 333 n.3 (citing 10A Wright, Miller & Kane § 2727, p. 138-43).

A primary issue of fact in this case is the intent of the Indian signatories to the treaties involved here. The Bruns submitted ample evidence that support their views. The government supplied nothing.

Thus, the United States did not meet the requirements for summary judgment and the district court grant of judgment and court of appeals affirmance were error. Fed. R. Civ. P. 56(c).

Applying the analysis required by *Oklahoma* leads to the conclusion that summary judgment was improper. Rule 56 allows granting of a summary judgment motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corporation v. Catrett*, 477 U.S. 317, 322-23 (1986).

Here, the district court completely ignored the need to determine the Indian intent in signing the treaty and found that there were ". . . no genuine issues of material fact . . . ." with reference to treaty interpretation. Order of August 26, 1994,

Appendix C. The Court of Appeals agreed. These rulings ignore the command that Indian intent be determined. *Oklahoma, supra.*

5.8. Taxation of Tribal Income Derived from Tribal Natural Resources Fringes Upon Tribal Self-Governance.

In *Oklahoma Tax Commission v. Chickasaw Nation, supra,* in finding that the State's income tax on tribal members living inside the reservation was permitted, the majority of five noted:

> Notably, the tribe has not asserted here, or before the Court of Appeals, that the State's tax infringes on tribal self-governance.

Oklahoma Tax Commission, supra, p. 2223.

In this case, however, the tribe has asserted that taxation is in interference with tribal policies and goals and this assertion has not been denied nor countered by the United States.

Imposition of federal income tax upon timber harvested by individual members upon tribal lands diminishes the value of all tribal timber. The value of the Band's timber that is the subject of the permit, which already is not amenable to harvest by ordinary commercial contract, decreases by the amount of federal income tax assessed on the proceeds derived by the individual member. The value of tribal timber that is suitable for harvest by commercial contract is diminished by the presence of unharvested timber that impedes timber growth and commercial harvest. Imposition of federal income tax upon proceeds derived from the harvest of tribal timber upon tribal lands by tribal members frustrates the congressional policies of self-determination and self-governance of federally recognized Indian tribes as well as the goal of maintaining a tribal timber program to provide for the long-term benefit of members of the Band.

The Band determined that the harvest of tribal forest products provides benefits to the members of the Band. When volumes or values are sufficiently small that formal contract sales are deemed unnecessary, or to expediently remove timber damaged by natural causes to minimize further loss in value, timber harvesting is accomplished through paid or free use timber cutting permits or free use without a permit. Complaint. ¶ 5.8.

The timber cutting permit is the primary instrument used to sell tribal timber on the Red Lake Diminished Reservation. On the Diminished portion of the Red Lake Reservation, only tribal members may be granted a permit to harvest and sell timber. *See, e.g.,* U.S. Department of Interior, Bureau of Indian Affairs, Red Lake Agency, "Policy Statement for Cutting of Forest Products Under Permit on Lands of the Red Lake Band of Chippewa Indians (FY 1981)", originally attached to Petitioner's Complaint.

Tribal members who are issued cutting permits of any kind may not allow the cutting or skidding of timber by nonmembers, other than family members of their household residing on the Red Lake Reservation. Complaint. ¶ 5.12.

Revenue from timber sales is vital to the Band, for it allows the Band to provide essential governmental services to its members residing on the Reservation. Complaint. ¶ 5.7. It is vital since natural resources still serve as the basis for virtually all non-governmental employment on the Red Lake Reservation. Meyer Decl., Appendix J., p. 74a.

Until relatively recently, tribal sawmills have served as a source of reservation income for more than fifty years providing nearly one-third of the non-public employment on the reservation. *Id.*, p. 75a. As sawmill operations have declined, tribal members, like the Bruns, have come to rely more on the older tradition of individual timber sales. *Id.*, p. 76a.

Commercial rice operations in other states have depressed that agricultural enterprise increasing the dependence on other natural resources such as timber. Meyer Decl., p. 76a.

Economic conditions at Red Lake fall below the national average for Indians. The average unemployment rate approaches, and seasonally surpasses, fifty percent. The average per capita income falls below the poverty level. Meyer Decl., p. 77a.

Thus, the assessment of federal income taxes upon tribal members' income derived from their harvest of tribal timber infringes on the Bands self-governance determination to maximize economic benefits to its members from timber resources.

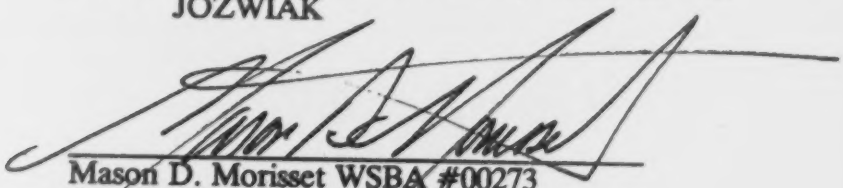
6. CONCLUSION.

Both the Circuit Court and District Court's refusal to investigate the intent and purposes of the treaties entered into by the Red Lake Band through a review of historical material is incorrect and clear error. The Red Lake Band submitted substantial historical material, the United States produced nothing. This insufficient for a finding of summary judgment, and such judgment is error. Although reaching different results on the merits, all nine justices of this Court agree that determining the purpose and intent of a treaty as to taxation is necessary and that resort to historical materials is appropriate for such review. *Oklahoma, supra.*

When read in the greater context of Indian law, the Red Lake Band treaties with the United States government must be interpreted to protect their natural resources from income taxation by the federal government. The government offered no factual underpinning that would support a finding that the intent of the treaty signors was any different. In that case, granting summary judgment to the party opposing the moving party is the proper procedure. *See, e.g., Portsmouth Square, Inc., v. Shareholders Protective Committee*, 770 F.2d 866 (9th Cir. 1985)("*sua sponte* summary judgment is appropriate where one party moves for summary judgment and, after the hearing, it appears from all evidence presented that there is no genuine issue of material fact and the non-moving party is entitled to judgment as a matter of law."). *Northland Greyhound Lines v. Amalgamated Ass'n.*, 66 F.Supp. 431 (D. Minn. 1946). The court below erred in granting the government's motion and refusing to grant the Bruns summary judgment.

Respectfully submitted this 10th day of January, 1996.

MORISSET, SCHLOSSER, AYER & JOZWIAK



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RED LAKE BAND OF CHIPPEWA INDIANS, ET AL.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-0976
UNITED STATES OF AMERICA, ET AL,	)	
Defendants.	)	

ORDER

After considering the Motion to Dismiss filed by the United States, the memorandum in support thereof and in opposition thereto, and the record herein, and it appearing as a matter of law that this is not the proper venue for a refund claim and that the Court lacks jurisdiction under the Declaration Judgment and Anti-Injunction Acts because of alternative remedies, the motion must be granted, and it is hereby

ORDERED that the United States' Motion to Dismiss is granted; and it is further

ORDERED that the complaint is dismissed, without prejudice to further proceeding that may be initiated in Minnesota.

_____
UNITED STATES DISTRICT JUDGE

September 24, 1992.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RED LAKE BAND OF CHIPPEWA INDIANS, ET AL.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 92-0976
UNITED STATES OF AMERICA, ET AL.,	)	
Defendants.	)	

ORDER

The Motion of plaintiffs to Reconsider and Amend Judgment is granted in part and denied in part.

As to the Bruns' refund claim, this Court's Order of September 24, 1992 is vacated and this aspect of the complaint is hereby transferred, pursuant to 28 U.S.C. § 1406(a), to the United States District Court for the District of Minnesota (Sixth Division), to prevent running of the statute of limitations.

In all other respects plaintiffs' motion to reconsider is denied.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

October: 27, 1992.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Red Lake Band of Chippewa Indians, and Gerald and Luella Brun,

Plaintiffs,

v.

United States of America, and the Commissioner of the Internal Revenue Service,

Defendants.

Civ. No. 4-92-1147

MEMORANDUM OPINION AND ORDER

Mason Morisset, Esq., Pirtle, Morisset, Schlosser & Aver, 1115 Norton Building, Seattle, WA 98104 appeared for the plaintiffs.

John A. Marrella, U.S. Department of Justice, Washington, D.C. 20044 appeared for the defendants.

This is a tax refund case begun in the United States District Court for the District of Columbia in which plaintiff Red Lake Band of Chippewa (the Tribe) sued on its own behalf and as parens patriae on behalf of its members seeking declaratory and other relief concerning the imposition of federal income tax on income derived from logging activity on tribal trust land. Band members Gerald and Luella Brun also sued on their own behalf seeking a tax refund and other relief. The District of Columbia court granted defendant's motion to dismiss all claims except the Bruns' refund claim. The case was then transferred here pursuant to 28 U.S.C. § 1406(a). Now before the court is defendants' motion for summary judgment.

I.

When this action was originally filed in the District of Columbia, the Tribe sought a declaratory judgment that the income its members derived from the harvest of timber from Tribal lands is not subject to federal income tax, a permanent injunction enjoining the IRS from assessing or collecting federal income tax on such income, and a remedy in the nature of mandamus to require the Commissioner of Internal Revenue to "recognize and implement tribal members' rights to harvest tribal timber free of federal taxation." Complaint at PP 10.1, 10.2.

On September 24, 1992, United States District Judge Gehard Gesell granted defendants' motion to dismiss the complaint on the basis that "this is not the proper venue for a refund claim and that the court lacks jurisdiction under the Declaration of Judgment and Anti-Injunction Acts because of alternative remedies . . .". Order dated September 24, 1992. Later, on October 27, 1992, the court granted in part plaintiffs' motion to Amend the Judgment:

> As to the Brun's refund claim, this Court's Order of September 24, 1992 is vacated and this aspect of the complaint is hereby transferred, pursuant to 28 U.S.C. § 1406(a), to the United States District Court for the District of Minnesota . . . to prevent the running of the statute of limitations.
>
> In all other respects plaintiffs' motion to reconsider is denied.

Order dated October 27, 1992. Thus the only claim now before the court is the refund claim of Gerald and Luella Brun.[1]

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[1] The United States argues that the Commissioner of Internal Revenue should no longer be a named defendant in this action because a suit for refund of taxes "may be maintained only against the United States and not against any

The Bruns seek refunds in the amount of $22,944.06 (Tax Year 1983), $9,024.45 (Tax Year 1984), and $4,608.74 (Tax Year 1985). The taxes were assessed on income the Bruns derived from the cutting and sale of timber from tribal lands pursuant to a permit issued by the Tribe. The basis for their refund claim is that the assessment of federal taxes constitutes a "molestation" of the Tribe's right to quiet enjoyment of tribal lands in violation of the Treaty of Greenville. The Bruns cite three treaties which they argue create a federal tax exemption: the Treaty of Greenville, the Treaty of Old Crossing, and the Supplement to Treaty of Old Crossing. In particular the Bruns point to the language in Article V of the Treaty of Greenville which states:

> To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States...[Until the Tribe's lands are sold to the United States,] the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States.

Treaty of Greenville Article V.[2]

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officer or employee of the United States." 26 U.S.C. § 7422(f)(1). Plaintiffs raise no objection and the Commissioner of Internal Revenue should be dismissed as a party.

[2] Plaintiffs have filed a motion to amend or withdraw an earlier admission. Plaintiffs did not answer a request for admission which stated that they were relying solely on the Treaty of Greenville, the Treaty of Old Crossing, and the Supplement to the Treaty of Old Crossing. Because they did not answer, the admission is deemed admitted under Fed. R.

According to their pretrial statement of the case, the Bruns seek a trial on the following issues:

1. The intent of the negotiators of the treaties with the Red Lake Band and particularly the Indian understanding of those treaties.

2. The specific meaning of the following treaty phrases:

   "quietly to enjoy them"
   "without any molestation from the United States"
   "quiet enjoyment"

3. The central importance of timber and logging in the economic life of the Red Lake Band and its

---

Civ. P. 36(a). Plaintiffs request they be allowed to withdraw the admission or amend it to say:

> Plaintiffs claim for refund is based on all treaties, statutes, congressional acts, executive orders, decided cases and other legal authorities which are pertinent to or support plaintiffs' claim of income tax exemption.

Defendant does not object to this amendment to the extent that it did not intend its requested admission to limit plaintiffs' legal arguments. Defendant has no objection to plaintiffs relying on any of the treaties, statutes, regulations, and Interior Department publications identified in their complaint, pre-trial statement of the case and interrogatory responses.

Granting plaintiffs' motion will not affect the merits of defendant's summary judgment motion because plaintiffs have not cited any treaties besides the three listed above and there is no objection to plaintiffs' citation of statutes, regulations and case law in its responsive papers. Plaintiffs' motion to amend their admission should be granted.

members.

Plaintiffs' Pretrial Statement of the Case at 5. The Bruns intend to prove their case by "calling an expert witness in the field of history, ethno-history, or anthropology to testify as to the construction of the treaties and the tribal understanding of the terms of the treaties." Id.

II.

The United States argues that like the income of other citizens, income earned by Indians is subject to federal income tax unless expressly exempted by a treaty or specific statute. It argues exemptions cannot be granted by implication, and that other courts have held that the treaties cited by plaintiffs do not
contain any language which could reasonably be interpreted as an express tax exemption.

The Bruns respond that the assessment of federal income taxes on proceeds derived directly from tribal lands upon which the members have a right to dwell under federal treaties and statutes violates the members' rights under those laws. They contend treaties must be construed favorably towards the Indians and according to the understanding of the Indians at the time the treaty was signed. Plaintiffs believe the treaties at issue here must be interpreted in light of the economic importance of timber harvesting to the Band and the historical context of the treaties themselves. The Bruns submit the declaration of Dr. Melissa Meyer in which she discusses the past history of the Band and the various treaties and concludes that the signers of the treaties would not have intended to subject themselves to federal taxation.

As a general principle, all income is subject to taxation unless exempted by a statute or rule of law. HCSC-Laundry v. U.S., 450 U.S. 1, 5 (1980). This principle applies equally to income earned by citizens who are Indians:

> Indians are citizens and that in the ordinary affairs of life, not governed by treaties or

> remedial legislation, they are subject to the payment of income taxes as are other citizens.

Squire v. Capoeman, 351 U.S. 1, 6 (1956).

> The general rule is that the reach of income tax statutes is broad; that exemptions from taxation are matters of legislative grace and that exemptions must be construed with restraint in light of the policy to tax income comprehensively.

Holt v. Commissioner, 364 F.2d 38, 40 (8th Cir. 1966), cert denied, 386 U.S. 931 (1967). Indian treaties are to be construed in favor of the Indian signatories, and ambiguities are to be resolved in their favor. Id. (citing Squire v. Capoeman, 351 U.S. 1, 6-7 (1956)). In cases involving tax exemptions, however, "such principles come into play only if such statute or treaty contains language which can reasonably be construed to confer income exemptions." Id. at 40.

Plaintiffs cite Squire v. Capoeman, 351 U.S. 1 (1956) for the proposition that courts will imply tax exemptions. Capoeman involved the taxability of income derived from cutting timber on allotted Indian lands. The court held that timber income from allotted lands was not taxable. Id. at 10. Allotted lands are lands allotted to individual tribe members from the treaty-guaranteed reservation under the General Allotment Act of 1887. Id. at 3-4. Under the allotment system the land is held by the United States in trust for the individual Indian for a specified period of years and then is conveyed to him in fee simple. Id. Under the terms of the General Allotment Act, the land is conveyed "free of all charge or encumbrance whatsoever". 25 U.S.C. § 348.

Plaintiffs in Capoeman were an Indian couple who derived income from the cutting of timber on their allotted land. In deciding plaintiffs' claim for a tax refund, the Court stated:

> We Agree with the Government that Indians are

> citizens and that in the ordinary affairs of life, not governed by treaties or remedial legislation, they are subject to the payment of income taxes as are other citizens. We also agree that, to be valid, exemptions to tax laws should be clearly expressed. But we cannot agree that taxability of respondents in these circumstances is unaffected by the treaty, the trust patent or the Allotment Act.

Id. at 6. The court went on to analyze the meaning of the statutory language of the General Allotment Act:

> Thus, the general words "charge or incumbrance" might well be sufficient to include taxation. But Congress in an amendment to the General Allotment Act, gave additional force to respondent's position. Section 6 of that Act was amended to include a proviso -- "That the Secretary of the Interior may, in his discretion, and he is authorized . . . to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted to prior to the issuing of such patent . . .

Id. at 7 (emphasis added). The Court found that the literal language of the proviso to the General Allotment Act:

> evinces a congressional intent to subject an Indian allotment to all taxes only after a patent in fee is issued to the allottee. This, in turn, implies that, until such time as the patent is issued, the allotment shall be free from all taxes, both those in being and those which might in the future be enacted.

Id. at 8. The Court's decision was therefore based on the

express exemption set forth in the General Allotment Act and its proviso, and not an implied exemption as argued by plaintiffs.

Plaintiffs here did not log on allotted land and do not even argue that the General Allotment Act or its proviso apply. They rely solely on the language of the treaties regarding "quiet enjoyment" and "without molestation".

The Eighth Circuit has already interpreted the Treaty of Greenville as not granting a tax exemption in Jourdain v. Commissioner, 617 F.2d 507 (8th Cir. 1980), cert denied, 449 U.S. 839 (1980). In Jourdain, the Eighth Circuit agreed with the
decision of the Tax Court which "held that the 'molestation' prohibited by the Treaty of Greenville was interference with the rights of Indians to hunt and otherwise enjoy their land, not the 'right' to be free from federal taxation." Id. at 509.

Jourdain was a member of the Red Lake Band of Chippewa and served as chairman of its tribal council. Id. at 508. His salary and expenses were paid out of monies dispersed to the Tribe by the Bureau of Indian Affairs from trust funds held for the Tribe's benefit. Id. Jourdain failed to report his tribal income and upon being assessed deficiencies, petitioned the Tax Court for a redetermination of his liability. Id. Relying on Squire v. Capoeman, he argued that the General Allotment Act exempted his tribal income from taxation. Id. The Court of Appeals upheld the ruling of the Tax Court that "the Capoeman exemption applies only to income derived from allotted land." Jourdain, 617 F.2d at 508.

Jourdain next argued that his income was exempt because taxation would be "molestation by the United States" prohibited under the language in the Treaty of Greenville. Id. The Court of Appeals rejected this argument and expressly agreed with the rulings of the Tax Court that Indians are subject to taxation unless specifically exempted by treaty or statute and the Treaty of Greenville did not provide a right to be free from taxation. Id. at 509.

The Bruns argue that the Jourdain case is distinguishable from the case at bar because the income which was taxed in Jourdain was the salary paid to a tribal official. They argue that their income here was derived directly from the land and therefore should be exempt from taxation under the "quiet enjoyment" and "without molestation" clauses of the treaty. No language in Jourdain limits its holding in this way, however, and in fact, other cases which did involve income derived from the land have held no tax exemption existed under the treaty. In Holt v. Commissioner, 364 F.2d 38 (8th Cir. 1966), cert denied, 386 U.S. 931 (1967), for example, the Court of Appeals refused to extend the Capoeman exemption to an individual tribe member's income derived from grazing cattle on tribal lands pursuant to a tribal grazing permit analogous to the timber permit in this case. Id. at 42. The source of the income in this case thus does not distinguish it from prior cases finding no tax exemption in the Treaty of Greenville.

Plaintiffs' income is not exempt under the express exemption of the General Allotment Act because admittedly it was not derived from allotted lands. The only other source of exemption language identified by plaintiffs is the treaty language which the Court of Appeals has already found to be insufficient to create a federal tax exemption. No exemption may be found in a treaty's silence. Confederated Tribes of Warm Springs Reservation of Oregon v. Kurtz, 691 F.2d 878, 882 (9th Cir. 1982). "Absent a 'definitely expressed exemption' Indian tribes and their members are subject to federal taxation." Id. Plaintiffs have not identified any other treaty language which they believe creates a tax exemption, and no genuine issues of material fact exist with respect to the Treaty of Greenville. Accordingly, defendants' motion for summary judgment should be granted.

ORDER

Accordingly, based upon the above, and all the files, records, and proceedings herein, IT IS HEREBY ORDERED that:

1) plaintiffs' motion to amend their earlier admission is granted and the admission shall read:

> Plaintiffs claim for refund is based on all treaties, statutes, congressional acts, executive orders, decided cases and other legal authorities which are pertinent to or support plaintiffs' claim of income tax exemption;

2) defendants' motion for summary judgment is granted, and the complaint is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Date: August 26, 1994

Diana E. Murphy
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Red Lake Band of Chippewa Indians, and Gerald and Luella Brun

Case No. Civil 4-92-1147

v.

JUDGMENT IN A CIVIL CASE

United States of America, and the Commissioner of the Internal Revenue Service

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( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that:

Plaintiffs' motion to amend their earlier admission is granted and the admission shall read:

> Plaintiffs claim for refund is based on all treaties, statutes, congressional acts, executive orders, decided cases and other legal authorities which are pertinent to or support plaintiffs' claim of income tax exemption; and

defendants' motion for summary judgment is granted, and the complaint is dismissed with prejudice.

DATE: August 29, 1994.

FRANCIS E. DOSAL, CLERK

Gloria M. Barkosky, Deputy Clerk

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 94-3591

Red Lake Band of Chippewa Indians, on its behalf and on behalf of its members; Gerald F. Brun; Luella R. Brun,	*	Appeal from the United States District Court for the District of Minnesota [UNPUBLISHED]
Appellants,	*	
v.	*	
United States of America,	*	
Appellee.	*	

Submitted: June 12, 1995

Filed: August 10, 1995

Before McMILLIAN, Circuit Judge, LAY, Senior Circuit Judge, and LOKEN, Circuit Judge.

PER CURIAM.

Gerald and Luella Brun ("taxpayers") appeal from a final judgment entered in the United States District Court[3] for the District of Minnesota holding that taxpayers' income from timber harvested on reservation lands of the Red Lake Band of Chippewa Indians ("the Band") was not exempted from federal

[3] The Honorable Diana E. Murphy, then United States District Judge for the District of Minnesota, now Circuit Judge, United States Court of Appeals for the Eighth Circuit.

taxation by treaty. For reversal, taxpayers argue that the district court erred in granting summary judgment in favor of the government because they had created a genuine issue of material fact as to the way in which Indian signatories would have understood certain treaty language. We affirm.

Taxpayers are enrolled members of the Band, a federally recognized Indian tribe. The reservation of the Band is located within the geographic boundaries of the state of Minnesota. During tax years 1983, 1984, and 1985, taxpayers derived income from the sale of timber cut, pursuant to tribal permits, from land located on the reservation and held in trust for the Band by the United States. None of the land from which timber was harvested was allotted to taxpayers under a trust patent pursuant to the General Allotment Act of 1887.

The Internal Revenue Service (IRS) assessed taxes plus interest for 1983 in the amount of $22,944.06, for 1984 in the amount of $9,024.45, and for 1985 in the amount of $6,204.76. Taxpayers paid each assessment in full and filed claims for refund for each year. The IRS denied the claims for refund for 1983 and 1984, but neither allowed nor denied their claim for 1985.

In April 1992, taxpayers filed a complaint in the District Court for the District of Columbia requesting a refund of taxes paid and interest in the amount of $36,577.25 for years 1983, 1984, and 1985. In the alternative, taxpayers sought an order that they owed no deficiency for 1985 and a reduction in penalties allegedly assessed against them for 1983 and 1984. The Band joined the action as a party plaintiff, acting both on its own behalf and as parens patriae for tribal members. The Band sought declaratory and injunctive relief. The Band and the taxpayers argued the income of its members derived from harvesting timber from tribal land was not subject to federal income tax. Specifically, taxpayers argued that the imposition of federal income tax on income derived from the harvest of timber from tribal land violated the Band's rights under the Treaty of Greenville, 7 Stat. 49 (1795), the Treaty of Old Crossing, 13 Stat. 667 (1863), and the Supplement to the Treaty of Old Crossing, 13

Stat. 689 (1864).[4]

In September 1992, the District Court for the District of Columbia dismissed the complaint on the ground that the District of Columbia was not the proper venue for taxpayers' refund claim and that it lacked jurisdiction over the Band's claims. The district court later vacated its judgment with respect to taxpayers' refund claim and transferred the refund claim to the District of Minnesota pursuant to 28 U.S.C. § 1406(a).

The government filed a motion for summary judgment on the ground that all income earned by Indians, like other citizens, is subject to federal income tax unless exempted by a treaty or specific statute. The government contended that the Treaties of Greenville and Old Crossing did not contain any exemptive language that might be reasonably construed to confer an exemption upon the taxpayers. The taxpayers, on the other hand, argued that a genuine issue of material fact existed as to the intent and understanding of Indian signatories to the treaties.

In August 1994, the district court granted summary judgment in favor of the government. Red Lake Band of Chippewa Indians v. United States, Civ. No. 4-92-1147 (D. Minn.

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[4] Taxpayers specifically relied on Article V of the Treaty of Greenville which provides in pertinent part as follows:

> To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States. . . . [Until the tribes' lands are sold to the United States,] the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States . . .

Aug. 29, 1994) (Memorandum Opinion and Order). The district court held that the Treaty of Greenville did not contain any language that could reasonably be construed to confer a tax exemption and that the express exemption provided in the General Allotment Act did not apply to income derived from unallotted tribal land. In so holding, the district court cited to this court's decision in Jourdain v. Commissioner, 617 F.2d 507, 509 (8th Cir.), cert. denied, 449 U.S. 839 (1980), in which we expressly agreed with the tax court's conclusion that "the 'molestation' prohibited by the Treaty of Greenville was interference with the rights of Indians to hunt and otherwise enjoy their land, not the 'right' to be free from federal taxation." We also agreed with the tax court that "Indians are subject to federal income tax unless specifically exempted by treaty or statute." Id. (citation omitted); see also Holt v. Commissioner, 364 F.2d 38, 40 (8th Cir. 1966) (indicating that the principle of liberal treaty construction in favor of Indians comes into play- only if the treaty can "reasonably be construed to confer income exemptions"), cert. denied, 386 U.S. 931 (1967). Finding no treaty language which conferred an income tax exemption for income derived from unallotted land, the district court accordingly concluded that taxpayers were subject to federal income tax and dismissed the refund claim.

After a careful review of the record, we find that no error of law appears in the district court's disposition of the present case, and we therefore affirm for the reasons set forth in the district court's memorandum opinion. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-3591MNMI

Red Lake Band of Chippewa Indians, etc., et al.	*	
Appellants,	*	
vs.	*	Appeal from the United States District Court for the District of Minnesota
United States of America,	*	
Appellee.	*	

Appellants' petition for rehearing has been considered by the Court and is denied.

October 12, 1995

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit

TREATY WITH THE CHIPPEWA — RED LAKE AND PEMBINA BANDS, 1863.

Articles of a treaty made and concluded at the Old Crossing of Red Lake River, in the State of Minnesota on the second day October, in the year eighteen hundred and sixty-three, between the United States of America, by their commissioners, Alexander Ramsey and Ashley C. Morrill, agent for the Chippewa Indians, and the Red Lake and Pembina bands of Chippewa; by their chiefs, head-men, and warriors.

ARTICLE 1. The peace and friendship now existing between the United States and the Red Lake and Pembina bands of Chippewa Indians shall be perpetual.

ARTICLE 2. The said Red Lake and Pembina bands of Chippewa Indians do hereby cede, sell, and convey to the United States all their right, title, and interest in and to all the lands now owned and claimed by them in the State of Minnesota and in the Territory of Dakota within the following described houndaries, to wit: Beginning at the point where the international boundary between the United States and the British possessions intersects the shore of the Lake of the Woods; thence in a direct line southwesterly to the head of Thief River, thence down the main channel of said Thief River to its mouth on the Red Lake River; thence in a southeasterly direction, in a direct line toward the head of Wild Rice River to the point where such line would intersect the northwestern boundary of a tract ceded to the United States by a treaty concluded at Washington on the 22d day of February, in the year eighteen hundred and fifty-five, with the Mississippi, Pillager, and Lake Winnebigoshish bands of Chippewa Indians; thence along the said boundary-line of the said cession to the mouth of Wild Rice River; thence up the main channel of the Red River to the mouth of the Shayenne; thence up the main channel of the Shayenne River to Poplar Grove; thence in a direct line to the Place of Stumps, otherwise called Lake Chicot; thence in a direct line to the head of the main branch of Salt River; thence in a direct line due north to the point where such line would intersect the international boundary aforesaid; thence eastwardly along said boundary to the place

of beginning.

ARTICLE 3. In consideration of the foregoing cession, the United States agree to pay to the said Red Lake and Pembina bands of Chippewa Indians the following sums, to wit: Twenty thousand dollars per annum for twenty years; the said sum to be distributed among the Chippewa Indians of the said bands in equal amounts per capita, and for this purpose an accurate enumeration and enrollment of the members of the respective bands and families shall be made by the officers of the United States: *Provided,* That so much of this sum as the President of the United States shall direct, not exceeding five thousand dollars per year, may be reserved from the above sum, and applied to agriculture, education, the purchase of goods, powder, lead, &c., for their use, and to such other beneficial purposes, calculated to promote the prosperity and happiness of the said Chippewa Indians, as he may prescribe.

ARTICLE 4. And in further consideration of the foregoing cession, and of their promise to abstain from such acts in future, the United States agree that the said Red Lake and Pembina bands of Chippewa Indians shall not be held liable to punishment for past offences. And in order to make compensation to the injured parties for the depredations committed by the said Indians on the goods of certain British and American traders at the mouth of Red Lake River, and for exactions forcibly levied by them on the proprietors of the steamboat plying on the Red River, and to enable them to pay their just debts, the United States agree to appropriate the sum of one hundred thousand dollars, it being understood and agreed that the claims of individuals for damages or debt under this article shall be ascertained and audited, in consultation with the chiefs of said bands, by a commissioner or commissioners appointed by the President of the United States; furthermore, the sum of two thousand dollars shall be expended for powder lead, twine, or such other beneficial purposes as the chiefs may request, to be equitably distributed among the said bands at the first payment: *Provided,* That no part of the sum of one hundred thousand dollars shall be appropriated or paid to make compensation for damages or for the payment of any debts owing from said Indians until the said commissioner or commissioners shall report each case with the

proofs thereof, to the Secretary of the Interior, to be submitted to Congress, with his opinion thereon, for its action; and that, after such damages and debts shall have been paid, the residue of said sum shall be added to the annuity funds of said Indians, to be divided equally upon said annuities.

ARTICLE 5. To encourage and aid the chiefs of said bands in preserving order and inducing, by their example and advice, the members of their respective bands to adopt the habits and pursuits of civilized life, there shall be paid to each of the said chiefs annually, out of the annuities of the said bands, a sum not exceeding one hundred and fifty dollars, to be determined by their agents according to their respective merits. And for the better promotion of the above objects, a further sum of five hundred dollars shall be paid at the first payment to each of the said chiefs to enable him to build for himself a house. Also, the sum of five thousand dollars shall be appropriated by the United States for cutting out a road from Leach Lake to Red Lake.

ARTICLE 6. The President shall appoint a board of visitors, to consist of not less than two nor more than three persons, to be selected from such Christian denominations as he may designate, whose duty it shall be to attend at all annuity payments of the said Chippewa Indians, to inspect their field and other improvements, and to report annually thereon on or before the first day of November, and also as to the qualifications and moral deportment of all persons residing upon the reservation under the authority of law; and they shall receive for their services five dollars a day for the time actually employed, and ten cents per mile for travelling expenses: *Provided,* That no one shall be paid in any one year for more than twenty days' service or for more than three hundred miles' travel.

ARTICLE 7. The laws of the United States now in force, or that may hereafter be enacted, prohibiting the introduction and sale of spirituous liquors in the Indian country, shall be in full force and effect throughout the country hereby ceded, until otherwise directed by Congress or the President of the United States.

ARTICLE 8. In further consideration of the foregoing cession, it is hereby agreed that the United States shall grant to each male adult half-breed or mixed-blood who is related by

blood to the said Chippewas of the said Red Lake or Pembina bands who has adopted the habits and customs of civilized life, and who is a citizen of the United States, a homestead of one hundred and sixty acres of land, to be selected at his option, within the limits of the tract of country hereby ceded to the United States, on any land not previously occupied by actual settlers or covered by prior grants, the boundaries thereof to be adjusted in conformity with the lines of the official surveys when the same shall be made, and with the laws and regulations of the United States affecting the location and entry of the same: *Provided,* That no scrip shall be issued under the provisions of this article, and no assignments shall be made of any right, title, or interest at law or in equity until a patent shall issue, and no patent shall be issued until due proof of five years' actual residence and cultivation, as required by the act entitled "An act to secure homesteads on the public domain."

ARTICLE 9. Upon the urgent request of the Indians, parties to this treaty, there shall be set apart from the tract hereby ceded a reservation of (640) six hundred and forty acres near the mouth of Thief River for the chief "Moose Dung," and a like reservation of (640) six hundred and forty acres for the chief "Red Bear," on the north side of Pembina River.

In witness whereof, the said Alexander Ramsey and Ashley C. Morrill, commissioners on the part of the United States, and the chiefs, headmen, and warriors of the Red Lake and Pembina bands of Chippewa Indians, have hereunto set their hands, at the Old Crossing of Red Lake River, in the State of Minnesota, this second day of October, in the year of our Lord one thousand eight hundred and sixty-three.

Alex. Ramsey,
Ashley C. Morrill,
Commissioners.

TREATY WITH THE CHIPPEWA - RED LAKE AND PEMBINA BANDS, 1864.

Articles supplementary to the treaty made and concluded at the Old Crossing of Red Lake River, in the State of Minnesota, on the second day of October, in the year eighteen hundred and sixty-three, between the United States of America, by their commissioners, Clark W. Thompson and Ashley C. Morrill, and the Red Lake and Pembina Bands of Chippewa Indians, by their chiefs, head-men, and warriors, concluding at the city of Washington, District of Columbia, on the 12th day of April, in the year eighteen hundred and sixty-four, between the United States, by the said commissioners, of the one part, and the said bands of the Chippewa Indians, by their chiefs, head-men, and warriors, of the other part.

ARTICLE 1. The said Red Lake and Pembina bands of Chippewa Indians do hereby agree and assent to the provisions of the said treaty, concluded at the Old Crossing of Red Lake River, as amended by the Senate of the United States by resolution bearing date the first of March, in the year eighteen hundred and sixty-four.

ARTICLE 2. In consideration of the cession made by said treaty, concluded at the Old Crossing of Red Lake River, and in lieu of the annuity payment provided for by the third article of said last-mentioned treaty, the United States will pay annually, during the pleasure of the President of the United States, to the Red Lake band of Chippewas the sum of ten thousand dollars, and to the Pembina band of Chippewas the sum of five thousand dollars, which said sums shall be distributed to the members of said bands, respectively, in equal amounts per capita, for which purpose an accurate enumeration and enrollment of the members of the respective bands shall be made by the officers of the United States.

ARTICLE 3. The United States will also expend annually, for the period of fifteen years, for the Red Lake band of Chippewas, for the purpose of supplying them with gilling-twine, cotton mater, calico, linsey, blankets, sheeting, flannels, provisions, farming-tools, and for such other useful articles and for such other useful-purposes as may be deemed for their best interests, the sum of eight thousand dollars: and

will expend in like manner, and for a like period, and for like purposes, for the Pembina band of Chippewas, the sum of four thousand dollars

ARTICLE 4. The United States also agree to furnish said bands of Indians for the period of fifteen years, one blacksmith, one physician, one miller, and one farmer; and will also furnish them annually, during the same period, with fifteen hundred dollars' worth of iron, steel, and other articles for blacksmithing purposes, and one thousand dollars for carpentering, and other purposes.

ARTICLE 5. The United States also agree to furnish for said Indians at some suitable point, to be determined by the Secretary of the Interior, a saw-mill with a run of millstones attached.

ARTICLE 6. It is further agreed, by and between the parties hereto, that article four of the said treaty, concluded at the Old Crossing of Red Lake River, and the amendment to said article, shall be modified as follows: that is to say, twenty-five thousand dollars of the amount thereby stipulated shall be paid to the chiefs of said bands, through their agent, upon the ratification of these articles, or so soon thereafter as practicable, to enable them to purchase provisions and clothing, presents to be distributed to their people upon their return to their homes; of which amount five thousand dollars shall be expended for the benefit of their chief, May-dwa-gwa-no-nind; and that from the remaining seventy-five thousand dollars the claims of injured parties for depredations committed by said Indians on the goods of certain British and American traders at the mouth of Red Lake River; and for exactions forcibly levied by them on the proprietors of the steamboat plying on the Red River, shall have priority of payment, and be paid in full, and the remainder thereof shall be paid pro rata upon the debts of said tribe incurred since the first day of January, in the year eighteen hundred and fifty-nine, to be ascertained by their agent in connection with the chief, in lieu of the commissioner or commissioners provided for in the fourth article of said treaty concluded at the Old Crossing of Red Lake River.

ARTICLE 7. It is further agreed by the parties hereto, that, in lieu of the lands provided for the mixed-bloods by article eight of said treaty, concluded at the Old Crossing of Red Lake River, scrip shall be issued to such of said

mixed-bloods as shall so elect, which shall entitle the holder to a like amount of land, and may be located upon any of the lands ceded by said treaty, but not elsewhere, and shall be accepted by said mixed-bloods in lieu of all future claims for annuities.

In testimony whereof, the said commissioners, on behalf of the United States, and the said chiefs, headmen, and war[r]iors, on behalf of the Red Lake and Pembina bands of Chippewa Indians, have hereunto affixed their hands and seals this twelfth day of April, in the year eighteen hundred and sixty-four.

Clark W. Thompson, [seal]
Ashley C. Morrill, [seal]
Commissioners.

TREATY WITH THE WYANDOT, ETC., 1795.

A treaty of peace between the United States of America and the Tribes of Indians, called the Wyandots, Delawares, Shawnanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Weea's, Kickapoos, Piankashaws, and Kaskaskias.

To put an end to a destructive war, to settle all controversies, and to restore harmony and a friendly intercourse between the said United States, and Indian tribes; Anthony Wayne, major-general, commanding the army of the United States, and sole commissioner for the good purposes above-mentioned, and the said tribes of Indians, by their sachems, chiefs, and warriors, met together at Greeneville, the head quarters of the said army, have agreed on the following articles, which, when ratified by the President, with the advice and consent of the Senate of the United States, shall be binding on them and the said Indian tribes.

ARTICLE I.

Henceforth all hostilities shall cease; peace is hereby established and shall be perpetual; and a friendly intercourse shall take place between the said United States and Indian tribes.

ARTICLE II.

All prisoners shall on both sides be restored. The Indians, prisoners to the United States, shall be immediately set at liberty. The people of the United States, still remaining prisoners among the Indians, shall be delivered up in ninety days from the date hereof, to the general or commanding officer at Greeneville, Fort Wayne or Fort Defiance and ten chiefs of the said tribes shall remain at Greeneville as hostages, until the delivery of the prisoners shall be effected.

ARTICLE III.

The general boundary line between the lands of the United States and the lands of the said Indian tribes, shall begin

at the mouth of Cayahoga river, and run thence up the same to the portage between that and the Tuscarawas branch of the Aluskingum: thence down that branch to the crossing place above Fort Lawrence; thence westerly to a fork of that branch of the great Miami river running into the Ohio, at or near which fork stood Loromie's store, and where commences the portage between the Miami of the Ohio, and St. Mary's river, which is a branch of the Miami, which runs into Lake Erie; thence a westerly course to Fort Recovery, which stands on a branch of the Wabash then south-westerly in a direct line to the Ohio, so as to intersect that river opposite the mouth of Kentucke or Cuttawa river. And in consideration of the peace now established; of the goods formerly received from the United States; of those now to be delivered, and of the yearly delivery of goods now stipulated to be made hereafter, and to indemnify the United States for the injuries and expenses they have sustained during the war; the said Indians tribes do hereby cede and relinquish forever, all their claims to the lands lying eastwardly and southwardly of the general boundary line now described; and these lands, or any part of them, shall never hereafter be made a cause or pretence, on the part of the said tribes or any of them, of war or injury to the United States, or any of the people thereof.

And for the same considerations, and as an evidence of the returning friendship of the said Indian tribes, of their confidence in the United States, and desire to provide for their accommodation, and for that convenient intercourse which will be beneficial to both parties, the said Indian tribes do also cede to the United States the following pieces of land; to-wit. (1.) One piece of land six miles square at or near Loromie's store before mentioned. (2.) One piece two miles square at the head of the navigable water or landing on the St. Mary's river, near Girty's town. (3.) One piece six miles square at the head of the navigable water of the Au-Glaize river. (4.) One piece six miles square at the confluence of the Au-Glaize and Miami rivers, where Fort Defiance now stands. (5.) One piece six miles square at or near the confluence of the rivers St. Mary's and St. Joseph's, where Fort Wayne now stands, or near it. (6.) One piece two miles square on the Wabash river at the end of the portage from the Miami of the lake, and about eight miles westward from Fort Wayne. (7.) One piece six miles square at the Ouatanon or old Weea towns on the Wabash river. (8.) One piece twelve miles

square at the British fort on the Miami of the lake at the foot of the rapids. (9.) One piece six miles square at the mouth of the said river where it empties into the Lake. (10.) One piece six miles square upon Sandusky lake, where a fort formerly stood. (11.) One piece two miles square at the lower rapids of Sandusky river. (12.) The post of Detroit and all the land to the north, the west and the south of it, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and so much more land to be annexed to the district of Detroit as shall be comprehended between the river Rosine on the south, lake St. Clair on the north, and a line, the general course whereof shall be six miles distant from the west end of lake Erie, and Detroit river. (13.) The post of Michillimackinac, and all the land on the island, on which that post stands, and the main land adjacent, of which the Indian title has been extinguished by gifts or grants to the French or English governments; and a piece of land on the main to the north of the island, to measure six miles on lake Huron, or the strait between lakes Huron and Michigan, and to extend three miles back from the water of the lake or strait, and also the island De Bois Blanc, being an extra and voluntary gift of the Chipewa nation. (14.) One piece of land six miles square at the mouth of Chikago river, emptying into the southwest end of Lake Michigan, where a fort formerly stood. (15.) One piece twelve miles square at or near the mouth of the Illinois river, emptying into the Mississippi. (16.) One piece six miles square at the old Piorias fort and village, near the south end of the Illinois lake on said Illinois river: And whenever the United States shall think proper to survey and mark the boundaries of the lands hereby ceded to them, they shall give timely notice thereof to the said tribes of Indians, that they may appoint some of their wise chiefs to attend and see that the lines are run according to the terms of this treaty.

And the said Indian tribes will allow to the people of the United States a free passage by land and by water, as one and the other shall be found convenient, through their country, along the chain of posts herein before mentioned; that is to say, from the commencement of the portage aforesaid at or near Loromie's store, thence along said portage to the St. Mary's, and down the same to Fort Wayne, and then down the Miami to lake Erie: again from the commencement of the portage at or near Loromie's store along the portage from thence to the river

Au-Glaize, and down the same to its junction with the Miami at Fort Defiance: again from the commencement of the portage aforesaid, to Sandusky, river, and down the same to Sandusky bay and lake Erie, and from Sandusky to the post which shall be taken at or near the foot of the rapids of the Miami of the lake: and from thence to Detroit. Again from the mouth of Chikago to the commencement of the portage, between that river and the Illinois, and down the Illinois river to the Mississippi, also from Fort Wayne along the portage aforesaid which leads to the Wabash, and then down the Wabash to the Ohio. And the said Indian tribes will also allow to the people of the United States the free use of the harbors and mouths of rivers along the lakes adjoining the Indian lands, for sheltering vessels and boats, and liberty to land their cargoes where necessary for their safety.

ARTICLE IV.

In consideration of the peace now established and of the cessions and relinquishments of lands made in the preceding article by the said tribes of Indians, and to manifest the liberality of the United States, as the great means of rendering this peace strong and perpetual; the United States relinquish their claims to all other Indian lands northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them, according to the boundary line agreed on by the United States and the king of Great-Britain, in the treaty of peace made between them in the year 1783. But from this relinquishment by the United States, the following tracts of land, are explicitly excepted. 1st. The tract of one hundred and fifty thousand acres near the rapids of the river Ohio, which has been assigned to General Clark, for the use of himself and his warriors. 2d. The post of St. Vincennes on the river Wabash, and the lands adjacent, of which the Indian title has been extinguished. 3d. The lands at all other places in possession of the French people and other white settlers among them, of which the Indian title has been extinguished as mentioned in the 3d article; and 4th. The post of fort Massac towards the mouth of the Ohio. To which several parcels of land so excepted, the said tribes relinquish all the title and claim, which they or any of them may have.

And for the same considerations and with the same views

as above mentioned, the United States now deliver to the said Indian tribes a quantity of goods to the value of twenty thousand dollars, the receipt whereof they do hereby acknowledge; and henceforward every year forever the United States will deliver at some convenient place northward of the river Ohio, like useful goods, suited to the circumstances of the Indians, of the value of nine thousand five hundred dollars; reckoning that value at the first cost of the goods in the city or place in the United States, where they shall be procured. The tribes to which those goods are to be annually delivered, and the proportions in which they are to be delivered, are the following.

1st. To the Wyandots, the amount of one thousand dollars. 2d. To the Delawares, the amount of one thousand dollars. 3d. To the Shawanese, the amount of one thousand dollars. 4th. To the Miamis, the amount of one thousand dollars. 5th. To the Ottawas, the amount of one thousand dollars. 6th. To the Chippewas, the amount of one thousand dollars. 7th. To the Putawatimes, the amount of one thousand dollars. 8th. And to the Kickapoo, Weea, Eel-river, Piankashaw and Kaskaskias tribes, the amount of five hundred dollars each.

Provided, That if either of the said tribes shall hereafter at an annual delivery of their share of the goods aforesaid, desire that a part of their annuity should be furnished in domestic animals, implements of husbandry, and other utensils convenient for them, and in compensation to useful artificers who may reside with or near them, and be employed for their benefit, the same shall at the subsequent annual deliveries be furnished accordingly.

ARTICLE V.

To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States; but when those tribes, or any of them, shall be disposed to sell their lands or any part of them, they are to be sold only to the United States; and until such sale, the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons

who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever.

ARTICLE VI.

If any citizen of the United States, or any other white person or persons, shall presume to settle upon the lands now relinquished by the United States, such citizen or other person shall be out of the protection of the United States; and the Indian tribe, on whose land the settlement shall be made, may drive off the settler, or punish him in such manner as they shall think fit; and because such settlements made without the consent of the United States, will be injurious to them as well as to the Indians, the United States shall be at liberty to break them up, and remove and punish the settlers as they shall think proper, and so effect that protection of the Indian lands herein before stipulated.

ARTICLE VII.

The said tribes of Indians, parties to this treaty, shall be at liberty to hunt within the territory and lands which they have now ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States.

ARTICLE VIII.

Trade shall be opened with the said Indian tribes; and they do hereby respectively engage to afford protection to such persons, with their property, as shall be duly licensed to reside among them for the purpose of trade, and to their agents and servants; but no person shall be permitted to reside at any of their towns or hunting camps as a trader, who is not furnished with a license for that purpose, under the hand and seal of the superintendent of the department north-west of the Ohio, or such other person as the President of the United States shall authorize to grant such licenses; to the end, that the said Indians may not be imposed on in their trade. And if any licensed trader shall abuse his privilege by unfair dealing, upon complaint and proof thereof, his license shall be taken from him, and he shall be

further punished according to the laws of the United States. And if any person shall intrude himself as a trader, without such license, the said Indians shall take and bring him before the superintendent or his deputy, to be dealt with according to law. And to prevent impositions by forged licenses, the said Indians shall at least once a year give information to the superintendent or his deputies, of the names of the traders residing among them.

ARTICLE IX.

Lest the firm peace and friendship now established should be interrupted by the misconduct of individuals, the United States, and the said Indian tribes agree, that for injuries done by individuals on either side, no private revenge or retaliation shall take place, but instead thereof, complaint shall be made by the party injured, to the other: By the said Indian tribes, or any of them, to the President of the United States, or the superintendent by him appointed; and by the superintendent or other person appointed by the President, to the principal chiefs of the said Indian tribes, or of the tribe to which the offender belongs; and such prudent measures shall then be pursued as shall be necessary to preserve the said peace and friendship unbroken, until the Legislature (or Great Council) of the United States, shall make other equitable provision in the case, to the satisfaction of both parties. Should any Indian tribes meditate a war against the United States or either of them, and the same shall come to the knowledge of the before-mentioned tribes, or either of them, they do hereby engage to give immediate notice thereof to the general or officer commanding the troops of the United States, at the nearest post. And should any tribe, with hostile intentions against the United States, or either of them, attempt to pass through their country, they will endeavor to prevent the same, and in like manner give information of such attempt to the general or officer commanding, as soon as possible, that all causes of mistrust and suspicion may be avoided between them and the United States. In like manner the United States shall give notice to the said Indian tribes of any harm that may be meditated against them, or either of them, that shall come to their knowledge; and do all in their power to hinder and prevent the same, that the friendship between them may be uninterrupted.

ARTICLE X.

All other treaties heretofore made between the United States and the said Indian tribes, or any of them, since the treaty of 1783, between the United States and Great Britain, that come within the purview of this treaty, shall henceforth cease and become void.

In testimony whereof, the said Anthony Wayne, and the sachems and war chiefs of the beforementioned nations and tribes of Indians, have hereunto set their hands and affixed their seals.

Done at Greeneville, in the territory of the United States northwest of the river Ohio, on the third day of August, one thousand seven hundred and ninety-five.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

THE RED LAKE BAND OF CHIPPEWA INDIANS, on its own behalf and on behalf of its members; and GERALD F. BRUN and LUELLA R. BRUN,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

No. 4-92 Civil 1147

DECLARATION OF MELISSA L. MEYER, Ph.D. (28 U.S.C. § 1746)

Melissa L. Meyer, declares as follows:

1. I am Melissa L. Meyer, Associate Professor of History, University of California, Los Angeles. My curriculum vitae is attached hereto as Attachment 1.

2. On or about May 25, 1994, I completed the "Declaration of Expert Historical Opinion Re: Red Lake Band of Chippewa v. United States, Cause No. 4-92 Civil 1147" (Attachment 2 hereto) and hereby declare it to be my expert opinion in this matter.

I declare under penalty of perjury that the foregoing is true and correct.

Signed on May 27, 1994, at 12:30 PM EST

/s/ Melissa L. Meyer
Melissa L. Meyer

Melissa L. Meyer, Ph.D.
Department of History JC-2X
6265 Bunche Hall
University of California, Los Angeles
Los Angeles, California DO024-1473

Declaration of Expert Historical Opinion Re:

Red Lake Band of Chippewa v. United States,
Cause No. 4-92 Civil 1147

The central issue of this case is whether "the income...Tribal members derived from their harvest of timber from Tribal lands is subject to federal income tax."[5] Plaintiffs cite "three treaties between the United States and the Red Lake Band that allegedly create an exemption from federal taxation: the Treaty of Greenville, the Treaty of Old Crossing, and the Supplement to Treaty of Old Crossing.[6] It has become an accepted axiom of federal Indian law that Indians' understandings of treaty terms are to be given priority in adjudicating claims. Given this, what understandings did the Red Lake Band have of the three treaties mentioned above? Reconstructing "understandings" of people who left few written records of their own is difficult; the passage of time complicates matters further. Nonetheless, some informed statements can be made based on current knowledge of native land use and resource allocation techniques in the past.

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[5] Red Lake Band of Chippewa Indians et al. v. United States of America, et al., Memorandum in Support of United States of America's Motion for Summary Judgment, Case No. 4-92 Civil 1147, In the United States District Court for the District of Minnesota, Fourth Division: 3.

[6] Ibid.: 4.

The 1795 Treaty of Greenville

First, from all indications, the Red Lake Band was not party to the Treaty of Greenville. The "Chippewa" were not a homogeneous, corporate group historically, nor are they today. Place names mentioned in the Treaty of Greenville ("Michillimackinac" (sic), "the strait between lakes Huron and Michigan," and "the island De Bois Blanc, being an extra and voluntary gift of the Chipewa (sic) nation"[7]) indicate bands of "Chippewa" located further to the east in the northern area of Lake Michigan. None of the Indian leaders whose names appear among the list of signatories is identified as a Red Lake Band member. Historical documentation suggests that the Red Lake Band, though having an established political structure and leadership prior to the earliest treaties, was involved in fur trade relationships more to the interior of Minnesota and the Red River Valley west of the Great Lakes and remained isolated from "official" involvement with the United States and its representatives until the 1820s.[8]

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[7] Treaty of August 3, 1795 (hereafter Treaty of Greenville) 7 Stat. 49, reprinted in Charles Kappler, comp. and ed. Indian Treaties 1778-1883 (Mattituck, NY: Amereon House, 1972, reprint of Indian Affairs: Laws and Treaties, vol. 2 Treaties[Washington, D.C.: U.S. Government Printing Office, 1904): 40.

[8] J. C. Beltrami, A pilgrimage in Europe and America, leading to the discovery of the sources of the Mississippi and Bloody river with a description of the whole course of the former, and of the Ohio (London: 1828); Lawrence J. Burpee, ed. Journals and Letters of Pierre Gaultier de Varennes de la Verendrye and his Sons (Toronto: The Champlain society, 1927); Charles Jean Baptiste Chaboillez, Journal of Charles Chaboillez, 1797-1798 (Masson Collections, No. 1, M.G. 19. c.l, Public Archives of Canada); Elliot Coues, ea., New Light on the Early History of the Greater Northwest, The Manuscript Journals of Alexander Henry, fur trader of the Northwest Company, and of David Thompson, official geographer and

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explorer of the same company. 1799-1814. Exploration and Adventure among the Indians on the Red

Saskatchewan, Missouri and Columbia River, 3 vols (New York: 1897); William H. Keating, Narrative of an Expedition to the Source of St. Peter's River, Lake Winnepeek Lake of the Woods etc., etc., Performed in the year 1823 by order of the Hon. J. C. Calhoun, Secretary of War, under the command of Stephen H. Lona, Maior U. S. T. E., 2 vols. (Philadelphia: 1824); Meriwether Lewis and William Clark, Travels in the Interior parts of America; communicating discoveries made in exploring the Missouri, Red River and Washita by Captains Lewis and Clark; Doctor Sibley and Mr. Dunbar; with a Statistical Account of the Countries Adjacent. As laid before the Senate by the President of the United States, February 1896 (London: 1807); Alexander Mackenzie, Voyages from Montreal on the river St. Lawrence, through the Continent of North America to the frozen and Pacific oceans; in the years 1789 and 1793...Preliminary account...of the fur trade of that country (London: 1901); Zebulon M. Pike, The Expeditions to the headwaters of the Mississippi River, during the years 1805-6-7 (Philadelphia: 1810); Henry Schoolcraft, Discovery of the Sources of the Mississippi or Narrative of an Expedition through the Upper Mississippi to Itasca Lake, the actual source of this River; embracing an exploratory trip through the St. Croix and Burntwood (or Brule) Rivers; in 1832 (New York: 1834); Henry Schoolcraft, Historical Table showing the number and location of the different Bands of Indians comprised within the agency of Sault Ste. Marie, Michigan Territory, 1824 (Field Records, Letters Sent at Michigan Superintendency, Vol. A., Records of the Bureau of Indian Affairs, National Archives); Henry Schoolcraft, Information respecting the History, Condition and Prospects of the Indian Tribes of the United States: collected and prepared under the direction of the Bureau of Indian Affairs.... Vols. I-VI (Philadelphia: 1853-1857); J. B. Tyrrell, ea., David Thompson's Narrative of His Explorations in Western America. (Toronto: The Champlain Society, 1916); Erminie Wheeler Voegelin and Harold Hickerson, Chippewa Indians I: The Red Lake and

Therefore, Red Lake Band members themselves were probably unaware of the Treaty of Greenville in 1795; they would have had no "understandings" of it.

Pembina Chippewa (New York: Garland Publishing Inc., 1974).

Terms of the Treaty of Greenville do, however, have bearing for the Red Lake Band. In return for peaceful relationships and considerable land cessions on the part of Indian groups party to the treaty, the United States, "as the great means of rendering this peace strong and perpetual," relinquished its claims "to all other Indian lands northward of the river Ohio, eastward of the Mississippi, and westward and southward of the Great Lakes and the waters uniting them."[9] The current Red Lake Reservation lies within this geographic area. Treaty language went on to clarify that "relinquishment" meant that Indians living within the lands had the right "quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States."[10] The year was 1795. Such language acknowledged the fact of complete American Indian sovereignty, including their long established practice of autonomous decision-making in regard to all matters of concern to them. Governing resource husbandry and allocation were central areas of concern especially to people who "owned" land and resources communally and approached economic decisions with the collective group's wellbeing in mind. Though Red Lake Band leaders were not directly involved in Treaty of Greenville negotiations, subsequent efforts to safeguard Red Lake interests and pursue various claims against the United States government have educated later generations of Red Lake leaders about the importance of the Treaty of Greenville's terms for them. It is fair to say that none of the Indian leaders mentioned, those party to the treaty, those covered by it, or those educated as to its importance for them,

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9 Treaty of Greenville: 41. Ibid.: 42.

10 Ibid.: 42.

imagined that a recognition of complete and total Indian sovereignty would somehow be construed as bestowing a right to the United States government to tax the income of Tribal members derived from their harvest of Tribal resources. It is analogous to the United States demanding the right to tax French citizens who were allowed to harvest timber from French public lands.

Usufruct Allocation Rights and the Red Lake Band

Admiringly pronouncing that American Indian groups held land in common has become a cliche -- a celebration of a romanticized stereotype and an indictment of capitalist systems all at once. Such statements do little to explain just how collective landholding systems operated. Such insight is critical to understanding how Red Lake Band members governed land and resource use and how they would have construed the terms of various treaties.

Usufruct rights or use rights governed resource allocation among most American Indian groups. No one individual "owned" any particular resource, but an individual or family group might claim the right to use a certain resource on a regular or annual basis. Usufruct rights included the responsibility of husbanding resources: determining when a field should lay fallow; deciding how much wild rice should be harvested and reseeded; clearing away undesirable plants that impeded growth of the desired plant;

making sure not to deplete the breeding stock in a certain fishing area, etc. Nearly all resources could be husbanded and allocated in this way, from animal habitat to stands of maple trees ("sugarbush") to fisheries to wild rice fields. Band members tacitly respected each other's usufruct rights; no centralized authority existed capable of coercing adherence to usufruct principles. But the threat of social ostracism far outweighed any benefits to be gained from intruding on another's use rights.

Usufruct systems of land and resource allocation were of greater longevity and duration among more sedentary groups. Families might return to the same "sugarbush" or wild rice field year after year, storing necessary utensils at the site in birchbark shelters in anticipation of their annual return. Among more mobile groups usufruct decisions had to be based more on immediate than long-term use.

By the early nineteenth century, Red Lake Band members had become accustomed to village life. Bands usually consisted of a married couple in the prime of life, plus related kin, broadly defined: siblings (the Chippewa reckoned that first cousins were siblings), children (those of siblings as well) and their families, elderly parents or grandparents, aunts and uncles, and friends and associates who were close enough to be considered fictive kin. Bands typically had a stable core of households with more peripheral relatives who drifted in and out. Each household was a smaller agnatic extended family.

Red Lake villagers made political decisions democratically, usually by the participants involved in major undertakings like hunting, making maple sugar, or harvesting wild rice. Commonly, village councils convened and deliberated matters of importance to all, such as making alliances, going to war, or negotiating with various Euroamerican agents. Even in this more formal context, no one exercised coercive control. By the nineteenth century, leadership roles might be determined in several ways. Some chiefs or oqimaaa in the Chippewa language, acquired their status through hereditary channels; being born into a prominent family or having a highly respected leader for a parent enhanced a talented child's chances of following in their footsteps. Women of the lineage could also assume positions of leadership and were usually referred to as "queens" or ocimaakwe; they could serve as proxies for absent male relatives or gain respect for their own capabilities. Civil leaders achieved their status through their suasive skills as orators or negotiators and led decision making in civil affairs. A loose form of age-grading characterized Chippewa politics and civil leaders tended to be older men, the "gray-heads," who let wisdom, patience, and level-headedness guide their actions. Conversely, warriors or war leaders typically were "younger men" or "hot heads," who were the first to defend and quick to seek revenge and pillage. Civil leaders generally acted as spokesmen and then warriors lent their support. Some men evolved from warriors to civil leaders as experience tempered their enthusiasm for war and family life heightened their appreciation of peace.

The Red Lake Band was reported as sedentary and farming by 1851[11]; it is safe to assume that they had done so for some time prior. Each village was economically and politically autonomous; there was no overarching Chippewa "tribe" or "nation," though villages shared cultural and linguistic traits and were cross-cut by affinal ties and exogamous, totemic clans. Clan members could expect aid and hospitality from totemic relatives on an intervillage basis. Village members shared interests in common territories and resources, decided upon civil and military leaders and lent them their support, united against common enemies, negotiated together with external Euroamerican agents, and gathered together for religious rituals. Villages were seats of sedentary pursuits where important economic activities were carried out. Task actors, predominantly women, regulated usufruct rights over fishing areas, wild rice fields, stands of maple and birch trees, and farming areas. Each family that so desired received rights to gather resources from certain areas to ensure equitable access and adequate resource husbandry. War parties and hunting parties were recruited from villages and returned there when they accomplished their objectives.

Hunting bands, recruited from villages, left the settled villages, most often in winter, to hunt and trap in contested areas closer to the Dakota (Eastern Sioux). Groups were "small enough to subsist by hunting and gathering but large enough to furnish

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[11] J. W. Bond, Minnesota and Its Resources (Chicago, 1856): 29394; Wheeler-Voegelin and Hickerson, The Red Lake and Pembina Chippewa: 123.

protection against hostile war parties and raids." Hunters cooperated to achieve greater efficiency; communal deer drives, deer impoundment, torch-light hunting, and joint bison hunts all ensured better results. Band leaders allocated particular areas for individuals or small groups to use on an ad hoc basis. A variety of factors related to the habits of each animal species determined allocation patterns. The considerations involved in allocating beaver grounds where traplines could be used differed from strategies for most effectively hunting deer. In all cases, decisions were based on immediate, seasonal grounds, not on repeated use.

A regularly patterned round of seasonal harvesting activities integrated the functions of the villages and hunting bands and amply supplied subsistence needs except for brief periods of deprivation in late winter.

When the lakes froze, small groups of bilateral kin, the hunting bands, left for game areas. They traveled light and made a winter camp. People cooked communally over a central fire around which wigwams were arranged. Each wigwam also had a central fire over which large racks for drying meat rested.

Men then made shorter trips to hunt game that contributed to their subsistence during the rest of the year. Women helped retrieve the kill and processed and allocated it among relatives. Women tanned the hides and furs that served as bedding and clothing and those intended for trade with Euroamericans. During this period men sometimes left for more distant hunting areas and stayed away for weeks at a time.

With the coming of spring, people left the winter camps, returned to the main villages, and immediately prepared to journey to the sugar bush. Sugaring leaders, usually women, allocated usufruct rights or rights of usage to a certain stand of maple trees to each household to which it returned annually. Birchbark and metal utensils were stored in a small lodge for future use in the annual sugaring process. During the year, people cached a store of food supplies nearby for use in the spring. The sugar camp soon became a bustle of activity. Women vigilantly kept the sap kettle boiling day and night until the think syrup became granulated. They stored the sugar in birchbark cones and the upper mandibles of ducks' bills.

During this time, some men fished with seines, hooks, traps, and spears. Fish served as an especially important food resource in the spring, but women exploited fish throughout the year, generally using nets that they constructed of nettle-stalk fiber and later of traders' twine. Fishing weirs were used. Red Lake fisheries were especially important focal points. By all of these means, Red Lakers netted many fish which they both ate at once and cut into thin slices and dried for future consumption.

After sugaring, families again returned to the villages to farm. Each family located its summer bark wigwam along the lake shore where it tended its own fields. Men broke additional ground every year to enlarge the garden, where women cultivated corn, squash, and pumpkins. Their annual harvest of produce could be

quite large.

Spring and summer signaled the onset of a series of gathering activities. Berries of all sorts -- blueberries, chokecherries, gooseberries, cranberries, and raspberries -- were dried and ground for storage. Roots were gathered in the spring; basswood and birchbark in the summer. Herbal specialists selected medicinal plants in August once they had fully developed and most had blossomed.

At the close of summer, people turned to harvest the highly nutritious wild rice that provided a significant proportion of their subsistence. Large groups gathered at the rice camps for the last time before bands dispersed for the winter. Ricing leaders, usually women, allocated a section of the rice field to each household to harvest, and everyone shared a tacit respect for these usufruct rights. Women went to the fields earlier in the summer to demarcate their area by tying some rice in sheaves and staking boundaries to show that they intended to harvest their area that year. When the rice ripened the harvest could begin in earnest. Rice was knocked into canoes and then processed on the shore. The Chippewa gathered successive harvests, accumulating great quantities of rice to last through the winter and beyond. Even so, they took only a portion of the total yield, encased some kernels in mud, and tossed them back into the water to ensure next year's crop.

After the wild rice harvest, each family group returned to its summer camp to harvest their farming produce. By this time, many men had departed for their fall hunts, leaving women and

children to tend to the harvest. Once this was completed, women turned to fishing until the men returned and they all left for the winter camps.[12]

Although movement from one place to another characterized the overall seasonal pattern, stability in the timing and locations gave the annual cycle great continuity. The diverse resource base provided a hedge against failure of any one resource. Taken as a whole, this subsistence strategy particularly suited the north country of Minnesota. It had endured through generations and the Chippewa adapted it to the demands of the Euroamerican fur trade and to the later reservation era.

The advent of the Euroamerican trade in furs and hides gradually transformed hunting from a subsistence activity to a commercial one. As native craft traditions were increasingly replaced by items of Euroamerican manufacture, Indians became dependent on trade goods that could only be obtained by exchanging furs and hides. Both the technology associated with the hunt and

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[12] The foregoing description of the typical nineteenth century Chippewa seasonal round rests on many sources. They are: Harold Hickerson, The Southwestern Chippewa: An Ethnohistorical Study, American Anthropological Association, Memoir 92 (Menasha, Wisc: American Anthropological Association, 1962); Harold Hickerson, The Chippewa and Their Neighbors: A Study in Ethnohistory (New York: Holt, Rinehart, and Winston, 1970); James G. E. Smith, Leadership among the Southwestern Olibwa, National Museums of Canada, Publications in Ethnology 7 (Ottawa: National Museums of Canada, 1973); Frances Densmore, Chippewa Customs, Bureau of American Ethnology, Bulletin 86 (Washington, D.C.: U.S. Government Printing Office, 1929); Frances Densmore, How Indians Use Wild Plants for Food, Medicine and Crafts (New York: Dover Publications, 1974); Priscilla K. Buffalohead, "Farmers, Warriors, Traders: A Fresh Look at Ojibway Women," Minnesota History 48 (1983): 236-44.

the time devoted to it intensified. This transformation did not happen overnight. Indeed, earliest exchanges involved manufactured items that had direct counterparts in Indian cultures. Only over time did Euroamerican traders succeed in introducing items that persuaded Indians to bring in ever more furs to trade. Despite the fact that most pre-contact Indian trade centered on ceremonial and political concerns rather than striking the best bargain, Indians eventually came to understand market terms.

Fur traders who established posts in the western Great Lakes region faced long, unreliable supply lines, which prompted them to turn to their native trading partners for subsistence resources. Game, fish, wild rice, maple sugar, and other seasonal produce became marketable commodities in addition to furs and hides. This development created more opportunities for both women and men to barter products of their labor for Euroamerican manufactured goods that made the basic tasks of their lives easier.[13]

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[13] George Quimby, Indian Culture and European Trade Goods (Madison: University of Wisconsin Press, 1966); Lewis Saum, The Fur Trader and the Indian (Seattle: University of Washington Press, 1965); Marshall Sahlins, Stone Age Economics (Chicago: Aldine, 1972); Arthur J. Ray and Donald Freeman, Give Us Good Measure: An Economic Analysis of Relations between the Indians and the Hudson's Bay Company before 1763 (Toronto: University of Toronto Press, 1978); George Dalton, "The Impact of Colonization on Aboriginal Economics in Stateless Societies," Research in Economic Anthropology 1 (1978): 113-84; Christopher L. Miller and George R. Hamell, "A New Perspective on Indian-White Contact: Cultural Symbols and Colonial Trade," Journal of American History 73 (1986): 311-28; Stephen Gudeman, "Anthropological Economics: The Question of Distribution," Annual Review of Anthropology 7 (1978): 347-77; Charles Cleland, "The Inland Shore Fishery of the Northern Great Lakes: Its Development and Importance in Prehistory," American Antiquity 47 (1982): 761-84; Carolyn Gilmore, Where Two Worlds Meet: The Great Lakes Fur Trade (St. Paul:

As the nineteenth century progressed, the Red Lake Chippewa continued to market produce from their seasonal round of harvesting activities. They also responded to new incentives offered by the developing market economy that accompanied increased Euroamerican settlement in the region. Snake root and ginseng were valued by American pharmacists; Indians had only to dig and sell it. Local whites bought birchbark baskets and other items of native manufacture. And Red Lake Indians found a market for timber and hay. The sale of all of these products easily integrated into the seasonal round. Harvesting them was governed by the same sort of usufruct allocation system that had been in place for generations. Marketing these new products can be seen as a creative adaptation by the Red Lake Band to the developing market economy that simultaneously enabled them to retain their sovereign, autonomous political system and collectively regulated subsistence system. Red Lake leaders made clear, conscious decisions to ensure that this would occur.

The 1863 Old Crossing Treaty & its 1864 Supplement

Alexander Ramsey was very clear about his intentions in negotiating the 1863 Old Crossing Treaty with the Red Lake Band and Pembina Chippewa. He stated his most important concern in the first sentence of the treaty journal that he kept and forwarded to his superiors. "Having, in compliance with your instructions, succeeded in effecting a treaty...for the extinction of

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Minnesota Historical Society Press, 1982).

their title to the large and important district of country known as the Red River Valley...."[14] He had other concerns as well: he wanted to unite the Red Lake and Pembina bands; he wanted only "chiefs and principal men" to attend; he wanted to pay an amount equal to what the Pillager band of Chippewa had received a few years before; and he wanted to accomplish all of this with utmost haste before winter set in.

He represented all but the most important of his objectives to the Indians in a straightforward fashion. In his journal he candidly admitted to deceiving the Indians of his real intent. He told them, "Their Great Father has no especial desire to get possession of their lands."[15] All he wanted was a right of way for unmolested travel on their roads and streams. He would entertain a cession of land only if the Indians so desired. This subterfuge obviously contrasts with his earlier profession that, "The position of the ceded tract, embracing all the routes of travel, commerce, and emigration between the Mississippi valley and the prosperous British colonies of northwestern America, renders the extinction of the Indian title thereto a matter of the first consequence to the people of this State, and essential, indeed, to the development of the northwest."[16] He misled them to prevent them from asking for an extravagant settlement.

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[14] Articles of a Treaty made and concluded at the Old Crossing of Red Lake River, October 2, 1863, 38th Congress, 1st Session, Executive, Treaty File, National Archives: 6.

[15] Ibid.: 16.

[16] Ibid.: 11.

To illustrate what a generous deal he thought the assembled Indians were receiving, Ramsey repeatedly described the area to be ceded as worthless to all. He told the Indians that they were poor and that white people could make the worthless lands at least a thousand times more productive and take care of all their needs. Indeed, God had ordained it; he did not know why, but was powerless to stop it: "For some wise reason which we cannot comprehend, the Great Spirit is pressing these white people all over the country."[17]

Not surprisingly, Red Lake leaders were not buying it. Little Rock countered, "You told us they (the lands) were not of much importance to us. The Master of Life gave us the river and the water thereof to drink, and the woods and the roads we depend on for subsistence, and you are mistaken if you think we derive no benefits from them. The Master of Life gave it to us for an inheritance, and gave us the animals for food and clothing."[18] No one ever acceded to Ramsey's assertions that the land had no value for them; repeatedly, they argued the opposite. Indeed, they clearly understood that unauthorized travel and trade by whites along the rivers had driven the game away and directly affected their livelihood. They emphasized all the resources supported on the land and how central they were to their economic well-being. This is directly in keeping with their seasonal round and their

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[17] Ibid.: 25.

[18] Ibid.: 18.

system of usufruct resource allocation which was still firmly intact.

When most native leaders showed reluctance to cede land without a great deal more money than the Pillagers had received, Ramsey resorted to other strategies. He continually held the fate of the Sioux who had attacked American settlers the year before up to them. In retribution, the Sioux had been driven from their homes, hundreds were still being held in prison, and 36 had been publicly hung. Despite protests from Chippewa leaders at the treaty negotiations that they had not robbed traders along the Red River a few years earlier, Ramsey demanded compensation. Red Lake Band members resented being held accountable by the United States, but also feared military reprisal. They insisted that American law, with its "bad trees (meaning the gallows)" and "dark hole in the ground, with a lock to lock us in (a dungeon),"[19] not be extended into their territory, a manifestation of their steadfast commitment to their sovereignty and their fear of meeting the same fate as the Sioux. Discerning their fear, Ramsey used it to his own ends. He insisted that they had to make a treaty or suffer the consequences of American law, complete with "bad trees" and "dark holes." He literally told them, as reported in his treaty journal, that they had to make a treaty to preserve their sovereignty and autonomy.

Ramsey made veiled assurances along these lines. The Treaty itself mentions that the Red Lake Band retained lands around Upper and Lower Red Lakes. The Treaty journal actually

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[19] Ibid.: 29.

uses the word "reservation,"[20] which has important implications in federal Indian law. Ramsey also promised on several occasions that they should retain the right to hunt on the ceded lands, but always with some sort of vague time limits ("It would not probably be wanted for settlement before the youngest man among them was a gray-headed old man"[21]).

Finally, Ramsey threatened that it was the last chance the Indians had to make a treaty. He intimated that Americans were so upset with the Sioux that they were of a mind to ignore Indian title completely and just take the lands they wanted. So much for the argument that Ramsey desired only a right-of-way (which American citizens had already taken, after all). A good deal of duplicity and manipulation characterized the negotiations for the 1863 Old Crossing Treaty.

It is unclear why the Red Lake Band finally agreed to the treaty after objecting to it up until the final day. Ramsey reported that Moose Dung, the most important leader, finally spoke in favor of it and that all the other "chiefs" except for one fell in line. Reportedly, though he was not satisfied with the terms, Moose Dung emphasized that he was a man who followed through on things and did not want the commissioners to go away disappointed. Did Moose Dung have a genuine change of heart, or were Ramseys machinations and veiled threats successful? The treaty journal does not tell us.

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[20] Ibid.: 25.

[21] Ibid.: 20.

The 1863 Old Crossing Treaty and its 1864 supplement continued the tradition of Red Lake sovereignty and autonomy. They ceded land to the United States for which they were to receive money, goods, and services. The retained all lands not specifically ceded.[22] But nothing in the language of the treaty required them to alter their political or economic practices. The years 1863 and 1864 pre-dated the later efforts of the United States government to allot reservation lands to individuals in privately owned plots. These years pre-dated later intrusive, indeed coercive, U.S. policies aimed at the forced assimilation of Indian people by banning their religious practices and forcing them to send their children to far-off boarding schools. In 1863 and 1864 the Red Lake Band, in their understanding, remained sovereign and autonomous. They were not "domestic dependent nations" in their mind. The word "non-competent" had not yet entered the lexicon of U.S. Indian policy.

Undoubtedly, U.S. treaty negotiators for both the 1863 and 1864 treaties and the earlier aborted 1851 treaty imagined that further land cessions would follow. The Red River Valley was becoming increasingly attractive to Euroamerican settlers, especially as the expansion of railroads advanced. They hoped to consolidate the Red Lake Band and the Pembina Band, and eventually all Chippewa bands in Minnesota, rather than treat

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[22] Kappler, Indian Affairs, Vol. 2: 853, 861; Charles C. Royce, comp., Indian Land Cessions in the United States, 18th Annual Report of the Bureau of American Ethnology, 1896-97, Part 2 (Washington, D.C.: U.S. Government Printing Office, 1899): 828.

with each of them as independent entities. They also hoped that the goods and services provided for by the treaties, as well as the parcels of land offered to people of mixed descent, would encourage them to "adopt the habits and pursuits of civilized life."[23] But the important point to emphasize here is that NOTHING REQUIRED THE RED LAKE BAND TO DO SO AND THEY CERTAINLY WOULD NOT HAVE AGREED TO DO SO.

The Highly Successful Struggle of the Red Lake Band to Maintain Political and Economic Sovereignty & Autonomy

The Red Lake Band has a unique history directly pertinent to the issues involved in this court case that go beyond the specific treaties cited. To illustrate my argument here, I am going to quote extensively, and uninterruptedly from one of my own publications, "The Red Lake Ojibwe," Chapter 16 in The Patterned Peatlands of Minnesota, H.E. Wright, Jr., Barbara A. Coffin, and Norman E. Aaseng, eds. (Minneapolis: University of Minnesota Press, 1992): 253-56

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[23] 1863 Old Crossing Treaty, Kappler, Vol. 2: 854. See also, Wheeler-Voegelin and Hickerson, The Red Lake and Pembina Chippewa, especially section "H. 1843-1863 The Treaty Period" where they quote and otherwise make extensive reference to unpublished treaty journals kept by treaty commissioners. They cite these treaty journals as being housed in a "Treaty File" at the National Archives. They were unavailable to me at the time of this writing.

"In the face of mounting pressure from outsiders to gain access to their resources, the Red Lake Ojibwe articulated a defense of their reservation as an ecosystem in which they were human participants. The Red Lake Reservation was established by treaty in 1863.... Through the 1889 Nelson Act, the Red Lake band ceded a large acreage to the north and west, much of it peatland, in return for an established reservation. Red Lake leaders hoped that the provision of the Nelson Act establishing definite reservation boundaries would ultimately protect their claim to the lands surrounding Upper and Lower Red Lakes.[24]

Between 1887 and 1934, the U.S. government embarked on an experiment in social engineering designed to eradicate Indian cultures nationwide and replace them with a romantic version of the American agrarian ideal, the small-scale yeoman farmer. This policy emphasized allotment of the reservation land bases to individuals to farm. Policymakers aimed to sever tribal communal bonds and to instill in Indian people an appreciation of private property that would enable them to become full participants in the market economy. They hoped that education and Christianization would hasten this transformation. Federal officials envisioned that Indians and their cultures would meld into the dominant society, retaining little of their heritage. The 1889 Nelson Act was to achieve this goal among the Minnesota Ojibwe people.[25]

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[24] Congressional Serial Set 2747.

[25] U. S. Statutes at Large 24 : 388-391, 25: 642-646 ; Leonard Carlson, Indians, Bureaucrats and Land: The Dawes Act and the Decline of Indian Farming (Westport, CT: Greenwood Press, 1981); Henry E. Fritz, The Movement for Indian Assimilation, 1860-1890 (Philadelphia: University of Pennsylvania Press, 1963); Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate the Indians 1880-1920 (Lincoln: University of Nebraska Press, 1984); Robert W. Mardock, The Reformers and the American Indian (Columbia: University of Missouri Press, 1971); Melissa L. Meyer, "'We Can Not Get a Living as We Used To": Dispossession and the White Earth Anishinaabeg, 1889-1920," The American

Red Lake band leaders selectively supported the Nelson Act negotiations. While they participated in an initial land cession, they adamantly refused to consider allotting the reservation land to individuals, selling the remainder, or allowing the proceeds to be deposited in a central fund to which all of the "Chippewa in Minnesota" shared a right. Leaders insisted on continuing to hold their land in common. They dismissed allotment provisions as a thinly veiled attempt to dispossess them of their lands and undermine their tribal relations. They would continue to maintain their opposition to these measures for the next hundred years, and they show no sign of reconsidering their stance today.[26]

Steadfast maintenance of their independent, collective rights formed the central facet of the Red Lake band's political ideology. The high proportion of swampland and forested land on the reservation aided them in resisting the proposed allotments. While the Ojibwe had many uses for swampland, policymakers

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Historical Review 96 (1991): 368-394; Melissa L. Meyer, The White Earth Tragedy: Ethnicity and Dispossession at a Minnesota Anishinaabe Reservation, 1889-1920 (Lincoln: University of Nebraska Press, 1994); Delos S. Otis, The Dawes Act and the Allotment of Indian Lands, F. P. Prucha, ed. (Norman: University of Oklahoma Press, 1973); Francis P. Prucha, American Indian Policy in Crisis: Christian Reformers and the Indian, 1865-1900 (Norman: University of Oklahoma Press, 1976); Francis P. Prucha, The Great Father: The United States Government and the American Indians (Lincoln: University of Nebraska Press, 1984).

[26] Congressional Serial Set 2747. 22

intended that all Indians should instead become market-oriented farmers. U.S. legislators saw timber at Red Lake as a marketable resource that would provide the necessary funding to fuel their assimilation programs. Allotting swampland and timberland to individuals would do little to enhance farming skills among the Red Lake Indians, so the nature of the land and the resistance of the Red Lake band continued to forestall allotment of the reservation land.

Fully aware of the threat posed by the Nelson Act, Red Lake leaders sought additional safeguards at the first opportunity. When government representatives showed interest in acquiring another land cession from the Red Lake band, Indian leaders attempted to manipulate the situation for their own ends. They remained adamant in their opposition to allotment of their land when Indian Office inspector James McLaughlin arrived to negotiate. Their leaders indicated, however, that they might be willing to agree to another land cession if they received legislative guarantees permitting them to retain communal ownership of their unallotted land base. McLaughlin agreed, and in 1904 the Red Lake Band secured the legislation on which their legal rights to what became known as the Red Lake Diminished Reservation are based. Government officials still hoped that the Red Lake band would eventually accept allotment of land, but the Red Lakers had reason to feel even more secure in their land tenure arrangements.[27]

The chain of events that occurred at the White Earth

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[27] Congressional Hearings 1920.

Reservation demonstrated to Red Lake leaders how individual land rights could undermine tribal relations and threaten the very economic base of the reservation. Ojibwe leaders, many of them market-oriented entrepreneurs of mixed descent from White Earth, formed the General Council of the Chippewa in 1913 in response to mismanagement of their tribal resources by the U.S. government. Because the 1889 Nelson Act had created the Chippewa in Minnesota Fund as the depository for the proceeds of all land and timber sales on Ojibwe-ceded lands, exercising any control over the administration of these funds required the participation of all of the Ojibwe reservations in Minnesota. Initially, the Red Lake band joined the General Council of the Chippewa to secure control over their common tribal funds from the federal government.[28]

In 1918, entrepreneurs of mixed descent from the White Earth Reservation attempted to use the General Council to divide the proceeds of all Ojibwe assets and distribute them among enrolled tribal members. As part of this plan, council leaders, very few of them from Red Lake, sought to have the Red Lake Diminished Reservation allotted and the surplus sold in accordance with the 1889 Nelson Act. The money from these land sales would contribute to the Chippewa in Minnesota Fund and would enrich the rest of the Ojibwe at the expense of the Red Lake band. Red Lake leaders severed ties with the General Council of the Chippewa and formed their own independent

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[28] Melissa L. Meyer, "Warehousers and Sharks: Chippewa Leadership and Political Factionalism on the White Earth Reservation, 1907-1920," Journal of the West 23 (1984): 32-46; Meyer, "We Can Not Get a Living..."; Meyer, The White Earth Tragedy....

General Council of the Red Lake Band to safeguard their interests.[29]

As part of their move toward independent status, Red Lake band leaders cast their loyalties with the Indian Office to guard against fulfillment of the terms of the Nelson Act. They consistently referred to the 1904 McLaughlin Agreement, which established their separate reservation property rights, as the legal basis of their claims.[30]

After 1918, in the midst of this crisis period, Red Lake leaders structured their independent council so that individualistic entrepreneurs could not easily gain control. They vested decision-making power in seven chiefs who, in turn, appointed five council members each. In the long run, such a structure would produce a tightly knit group, probably related by kinship, whose members shared a similar conservative outlook on reservation policy and cultural adaptation. This organizational structure provided for continuity and a degree of ethical exclusivity by adapting the traditional political band structure to allow for the concentration of power in the hands of these seven Chiefs.[31]

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[29] Bureau of Indian Affairs, White Earth Central Classified Files (BIA/WECCF) 054, 056; Bureau of Indian Affairs, Red Lake Central Classified Files (BIA/RLCCF) 054, 056; Congressional Serial Set 8838, 10085, 10229.

[30] BIA/RLCCF 054

[31] BIA/RLCCF 054, 056; Erwin F. Mittelholtz, Historical Review of the Red Lake Indian Reservation, Redlake, Minnesota: A History of Its People and Progress, Beltrami County Historical Society Collections No. 2 (1957).

"Founders of the Red Lake council defended their right to determine the structure of reservation government by arguing that their tribal relations had never been severed by allotment of the reservation land base. In essence, they were using the terms of U.S. policy to preserve their own interests. They recognized that their separate, independent status made them unique among the Minnesota Ojibwe. Leaders argued that their successful perseverance through the harshest of the U.S. government's assimilation campaign entitled them to retain their council of chiefs as the governing body on the reservation.[32]

The General Council of the Red Lake Band maintained its separate status in the face of the 1934 Indian Reorganization Act. Under authority of this act, leaders of the other Ojibwe reservations in Minnesota agreed to incorporate as the Minnesota Chippewa Tribe. After much deliberation and concern for their separate tribal assets, Red Lake leaders decided not to cooperate with the elective governmental structure of the Minnesota Chippewa Tribe, which would have jurisdiction over all the reservations. Fearing that restrictions on their political autonomy might follow any relationship with the Minnesota Chippewa Tribe, the Red Lake band refused to cooperate even on a temporary basis.[33]

The entire governmental structure at Red Lake had evolved to protect land and resources from both external and internal threats.

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[32] BIA/RLCCF 054, 056; congressional Serial Set 8838, 10085, 10229.

[33] BIA/RLCCF 054, 056; U. S. Statutes at Large 48: 984; Congressional Serial Set 10085, 10229.

Today the Red Lake Reservation retains the only contiguous, unallotted reservation in Minnesota, and the band's accomplishment in retaining their land base is exceptional among Indian reservations nationwide. Only a few tribal groups have been able to retain a significant proportion of their land bases; the majority today possess only fragments of their original reservation holdings. The Red Lake band tenaciously persevered in retaining its landed reserve in all its diversity -- peatlands, forest lands, prairie, lakes, and streams -- understanding full well its importance to the survival of their culture."

The Red Lake Economy Today

Fish and other natural resources still serve as the basis for all of the nongovernmental employment on the Red Lake Reservation today. The components of the self-supporting element of the reservation economy remain the same as they have for generations -perhaps even centuries; only the techniques for managing and harvesting the resources have intensified. In a very real sense, the cultural and economic heritage of the Red Lake Ojibwe, one that very likely resembles the customs of all prior native inhabitants of the area, has carried them through the decades and continues to sustain them today.

The Red Lake Reservation economy still relies heavily on four of the natural resources upon which the people have relied

for generations: 1) fish, 2) timber, 3) wild rice, and 4) game.

Red Lake Band members have been commercial fishers for over 70 years. Initially they made the transition from a subsistence economy simply by selling part of their harvest to traders or local merchants, allowing households to participate in the cash economy, if only peripherally. By 1929, the Red Lake Band organized the Red Lake Fisheries Association, which processed walleye, perch and six other species. The Red Lake fishery remains the major source of employment on the reservation today, generating two-thirds of the nonpublic employment, and stands out as the single most important component of the reservation economy.[34]

Until the early 1980s, the Red Lake Indian Sawmills had served as a source of reservation income for more than 50 years, providing nearly one-third of the non-public employment on the reservation. The first steam-operated sawmill was constructed in Redby in 1924, its prosperity resting on the profitability of processing white pine and Norway pine. Since then the mill has been rebuilt and updated, but the availability of highly profitable pine has decreased, and Red Lakers have had difficulty maintaining profitable returns. As early as the 1930s, sawmill managers recognized their need to obtain timber from the open market rather than the reservation to keep the mill in operation.

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[34] Congressional Serial al Set; Annual Reports of the Commissioner of Indian Affairs 1917-1965; Walter Butler Company, Inc. Peat utilization and the Red Lake Indian Reservation, for the Minnesota Department of Natural Resources, Division of Minerals, requisition 13657 (St. Paul: Walter Butler Company, Inc.: 1978); Meyer, "The Red Lake Ojibwe": 258.

In the past, there had been some discussion of using swamp species. The mill closed in the early 1980s. That tribal members like the Bruns would come to rely more on the older tradition of individually acquiring tribal permission to sell tribal timber is only logical, given the state of the tribal timber industry in the 1980s.[35]

Wild rice is still harvested by the traditional canoe and flail method on the reservation, and tribal specialists have experimented with cultivated paddy operations using nonshattering strains of rice. Until the 1980s, wild rice held the most promise for agricultural development at Red Lake. Since then, however, commercial paddy operations in California have eclipsed Minnesota as the major producer of wild rice in the world. The heavy capital outlays required to establish wild rice paddies will make it increasingly difficult for the Red Lake Band to break into what once seemed the most lucrative agricultural enterprise for the reservation. The failure of this commercial avenue increases the Red Lake Band's dependence on the other three natural resources most important to their economic well-being.[36]

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[35] Congressional Serial Set 10761, 11897; Annual Reports of the Commissioner of Indian Affairs 1924-1965; Walter Butler Company, "Peat Utilization"; Elizabeth Irving, Interviews with Bud Anderson, Roger Anderson, Joe Day, Roger Jourdain, and Anthony Wilson, Transcripts in the possession of Melissa L. Meyer, 1989; Meyer, "The Red Lake Ojibwe": 258.

[36] Thomas Vennum, Jr., Wild Rice and the Ojibway People (St. Paul: Minnesota Historical Society Press, 1988); Stuart Berde, "Wild Ricing: The Transformation of an Aboriginal Subsistence Pattern," In J.A. Paredes, Anishinabe: Six Studies of Modern Chippewa (Tallahassee: University of Florida Press, 1980): 101-25; E.A. Oelke, et al., "Wild Rice Production in Minnesota," Agricultural Extension Service Bulletion 464 (St. Paul: University of Minnesota, 1982); E.H. Winchell and R.P. Dahl, "Wild Rice: Production, Prices, and Marketing," Agricultural Experiment Station, Miscellaneous Publication 29 (St. Pau: University of Minnesota, 1984); R.N.

Hunting represents much more than a cultural heritage to the Red Lake Band; it is crucial to their economic subsistence. Fish, moose, deer, and wild fowl still make up more than 50% of the Red Lake diet. These game resources contribute to the delicate subsistence balance on the reservation, providing food that enables Red Lake people to spend their meager cash income on other things.[37]

All of these tribal enterprises have contributed to a slowly developing economic self-sufficiency, but Red Lake employment statistics still look bleak. Economic conditions at Red Lake fall below the national average for Indians. The average unemployment rate approaches and seasonally surpasses 50%, and the average per capita income falls far below the poverty level. At the same time, the population of Red Lake is increasing faster than the average Indian population, bolstered by the return migration of Indians from nearby urban areas. The marginal Red Lake economy depends centrally on the nongovernmental employment afforded by fish, timber and other natural resources.[38]

Nelson and R.P. Dahl, "The Wild Rice Industry: Economic Analysis of Rapid Growth and Implications for Minnesota," Institute of Agriculture, Forestry, and Home Economics, Department of Agricultural and Applied Economics Staff Paper P86-25 (St. Paul: University of Minnesota, 1986); Walter Butler Company, "Peat Utilization": Meyer, "The Red Lake Ojibwe:" 258.

[37] Walter Butler Company, "Peat Utilization"; Meyer, "The Red Lake Ojibwe:" 258.

[38] Ibid.

Archaeological and historical research dovetail to establish that the components of an ancient way of life evolved by indigenous people in Minnesota's north country have persisted to leave a distinctive mark on contemporary Indian cultures.[39] The resources of the Red Lake Reservation ecosystem remain as central to the livelihood and well-being of the Indian people who live there today as they were to their ancestors. Of similar duration and longevity has been the Red Lake Band's successful commitment to maintaining their political sovereignty and their tribal system of communal resource ownership and usufruct allocation rights. In 1989, Tribal chairman Roger Jourdain continued in this tradition, saying, "The wildlife, timber, and fish are our greatest resource,...(the) primary source of employment and income for the Tribe." For the native people, the importance of the ecosystem and its resources to their way of life has remained unchanged.[40]

Conclusions

The above discussion should illustrate two fundamental points: 1) Since its earliest negotiations with U.S. officials, the Red

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[39] Mary K. Whelan, "The Archaeological and Ethnohistoric Evidence for Prehistoric Occupation," In The Patterned Peatlands of Minnesota, H.E. Wright, Jr., Barbara A. Coffin, and Norman E. Aaseng, eds. (Minneapolis: University of Minnesota Press, 1992): 239-49.

[40] Ibid .

Lake Band has clearly and consciously and successfully made decisions specifically to maintain its communally-held land base and its sovereign autonomy to make political and economic decisions in its best interests, and 2) Usufruct allocation of all resources held in common has characterized the Red Lake Band economy since earliest recorded history. For someone of my background and expertise, the Bruns' harvesting of tribal timber immediately seemed precisely in line with this generations' old tradition and right. It is no wonder that the Red Lake Band would press its right to allocate the right to harvest tribal timber to its members in the courts. And their efforts to do so are themselves part of a much longer pattern of the Red Lake Band's struggle successfully to preserve their political autonomy and sovereignty. I must hearken back to my earlier analogy. It is fair to say that no Red Lake leaders at any juncture of this struggle for sovereignty imagined that a recognition of Indian sovereignty would somehow be construed as bestowing a right to the United States government to tax the income of Tribal members derived from their harvest of Tribal resources. It is analogous to the United States demanding the right to tax French citizens who were allowed to harvest timber from French public lands.

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Supreme Court, U.S.
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No. 95-1129

In the Supreme Court of the United States

OCTOBER TERM, 1995

RED LAKE BAND OF CHIPPEWA INDIANS, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether income received by individual members of the Red Lake Band of Chippewa Indians from logging activity conducted on tribal land is exempt from federal income tax.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1129

RED LAKE BAND OF CHIPPEWA INDIANS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20a-23a) and the opinion of the district court (Pet. App. 6a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1995. The petition for rehearing was denied on October 12, 1995 (Pet. App. 25a). The petition for a writ of certiorari was filed on January 10, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners Gerald F. Brun and Luella R. Brun are members of the Red Lake Band of Chippewa Indians (the Band), a federally recognized Indian tribe. During 1983, 1984, and 1985, petitioners derived income from the sale of timber that they cut from land located on the Red Lake Reservation that is held in trust for the Band by the United States Government. None of this land had been allotted to petitioners under a trust patent pursuant to the General Allotment Act of 1887 (Pet. App. 21a).

2. The Commissioner of Internal Revenue determined that the income that petitioners derived from timber sales was subject to federal income tax. Petitioners paid the resulting assessments of tax and interest and brought this suit for refund.[1] They alleged that the assessments violated tribal treaty rights, Article VI of the United States Constitution, and congressional policies regarding tribal timber and the exercise of treaty-protected activities. Petitioners relied specifically on Article V of the

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[1] Petitioners initially filed this refund suit in the United States District Court for the District of Columbia. They were joined as plaintiffs in the suit by the Band, acting both on its own behalf and as *parens patriae* for its members. The Band sought declaratory and injunctive relief, as well as relief in the nature of mandamus, precluding the imposition of federal taxes on income derived from logging activity on tribal land. The district court dismissed the complaint for improper venue as to petitioners' refund claim and for lack of jurisdiction as to the claims of the Band. Petitioners' refund claim was subsequently transferred to the United States District Court for the District of Minnesota. The claims of the Band were not reinstated or transferred, and the dismissal of those claims was not appealed (Pet. App. 7a, 21a-22a).

Treaty of Greeneville, Aug. 3, 1795, 7 Stat. 52, which provides in pertinent part as follows (Pet App. 40a):

> To prevent any misunderstanding about the Indian lands relinquished by the United States in the fourth article, it is now explicitly declared, that the meaning of that relinquishment is this: The Indian tribes who have a right to those lands, are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States[.] * * * [Until the tribes' lands are sold to the United States,] the United States will protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States * * * .

3. The district court held that the income that petitioners derived from logging activities is not exempt from federal income tax (Pet. App. 14a). The court noted that members of Indian tribes are subject to federal tax in the absence of a specific exemption by treaty or statute and that the rule of construction favoring Indian signatories to a treaty applies only when the treaty in question contains language that could reasonably be construed to confer an exemption (Pet. App. 10a-12a). Following the opinion of the Eighth Circuit in *Jourdain* v. *Commissioner*, 617 F.2d 507, 509, cert. denied, 449 U.S. 839 (1980), the district court found that the "molestation" that is prohibited by the Treaty of Greeneville does not refer to federal taxation but—as the language of the Treaty reflects—to interference with the rights of the Indians to hunt, plant, dwell upon, and otherwise enjoy the land (Pet. App. 13a). The court also noted that the express tax exemption provided under the General Allotment Act is inapplicable to income

derived from unallotted tribal land (Pet. App. 14a). The court therefore granted summary judgment to the government (Pet. App. 15a, 17a-18a).

4. The court of appeals affirmed per curiam (Pet. App. 20a-23a). The court noted that it previously had held that the Treaty of Greeneville, on which petitioners rely, protected "the rights of Indians to hunt and otherwise enjoy their land" and did not confer a "'right' to be free from federal taxation" (Pet. App. 23a, quoting *Jourdain* v. *Commissioner*, 617 F.2d at 509). The court therefore affirmed for the reasons set forth in detail in the opinion of the district court (Pet. App. 23a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. a. Like all other citizens of the United States, members of Indian tribes are subject to federal income taxation unless exempt by treaty or statute. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. 2214, 2224 n.16 (1995); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 156-157 (1973); *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 420 (1935). Moreover, as this Court has consistently held, with respect to "Indians as to all others," tax exemptions are not to be found by implication but must be clearly expressed. *Oklahoma Tax Comm'n* v. *United States*, 319 U.S. 598, 606 (1943). See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 156; *Squire* v. *Capoeman*, 351 U.S. at 6; *Choteau* v. *Burnet*, 283 U.S. 691, 696 (1931).

Petitioners have not identified any statute or treaty provision that exempts their logging income from federal income tax. The Treaty of Greeneville, on which they principally rely (Pet. 4-5; see also Pet. App. 8a-9a, 21a), is completely silent with respect to taxation.[2] Furthermore, the conclusion reached by the court of appeals both in the present case (Pet. App. 23a) and in *Jourdain* v. *Commissioner*, 617 F.2d at 509—that "the 'molestation' prohibited by the Treaty of Greeneville was interference with the rights of Indians to hunt and otherwise enjoy their land, not the 'right' to be free from federal taxation"—is well founded. A federal income tax was not contemplated by either the United States or the signatory tribes when the Treaty of Greeneville was executed in 1795, and the drafters thus could not have been referring to exemption from income taxation. Moreover, it is apparent from the language of the Treaty that the parties were instead concerned with physical harassment by white settlers and encroachment on Indian lands. For example, in Article V of the Treaty (Pet. App. 40a-41a), the United States bound itself to "protect all the said Indian tribes in the quiet enjoyment of their lands against all citizens of the United States, and against all other white persons who intrude upon the same." Article VII of the Treaty (Pet. App. 41a) provided that "[t]he said tribes * * * shall be at liberty to hunt within the

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[2] Although petitioners also refer (Pet. 4) to the Treaty of Old Crossing, Oct. 2, 1863, 13 Stat. 667, and the Supplement to the Treaty of Old Crossing, Apr. 12, 1864, 13 Stat. 689, as they did below (see Pet. App. 8a, 21a), these agreements, too, are silent on the issue of taxation (see Pet. App. 27a-30a, 32a-34a), and petitioners have not identified any other exemptive language within their terms.

territory and lands which they have now ceded to the United States, without hindrance or molestation, so long as they demean themselves peaceably, and offer no injury to the people of the United States." In *Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 335, 342 & n.6 (1945), this Court similarly interpreted the term "molestation" in an Indian treaty to refer to physical interference with the quiet enjoyment and occupation of the land.

b. In the absence of a treaty provision specifically exempting petitioners' logging income from federal income tax, that income is taxable to them under Section 61(a) of the Internal Revenue Code. See 26 U.S.C. 1, 61(a); *HSCS-Laundry* v. *United States*, 450 U.S. 1, 5 (1981); *Squire* v. *Capoeman*, 351 U.S. at 6, 9-10 n.19; *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. at 420-421; *Choteau* v. *Burnet*, 283 U.S. at 693-694. See also *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. at 2224 n.16. The fact that the same income would have been exempt from tax (see Pet. 17-18) if derived from a trust allotment (pursuant to the General Allotment Act of 1887 or legislation read in pari materia with that Act), if earned by the Band (see Rev. Rul. 67-284, 1967-2 C.B. 55, 58), or if received by petitioners as a per capita distribution of tribal revenues (under 25 U.S.C. 117 and 1407) demonstrates only that Congress may choose to accord exempt treatment to certain entities or types of income, while leaving other income, such as petitioners' logging income, subject to tax. See *Commissioner* v. *Glenshaw Glass Co.*, 348 U.S. 426, 429, 431 (1955); *Commissioner* v. *Jacobson*, 336 U.S. 28, 49 (1949); *Deputy* v. *DuPont*, 308 U.S. 488, 493 (1940); *Choteau* v. *Burnet*, 283 U.S. at 696-697; *Fry* v. *United States*, 557 F.2d 646, 649 (9th Cir. 1977), cert.

denied, 434 U.S. 1011 (1978); *Commissioner* v. *Walker*, 326 F.2d 261, 263 (9th Cir. 1964); *Critzer* v. *United States*, 597 F.2d 708, 714 (Ct. Cl.), cert. denied, 444 U.S. 920 (1979).[3]

2. a. Contrary to petitioners' argument (Pet. 8-15), the decision in this case does not conflict with established rules of treaty construction, including those articulated by this Court in *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, *supra*. The principle that treaties are to be construed liberally in the favor of Indian signatories requires only that reasonable ambiguities be resolved in their favor. *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. at 2226 (Breyer, J., concurring in part and dissenting in part); *South Carolina* v. *Catawba Indian Tribe*, 476 U.S. 498, 506 (1986); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 247 (1985); *Carpenter* v. *Shaw*, 280 U.S. 363, 367 (1930); *Choate* v. *Trapp*, 224 U.S. 665,

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[3] Although petitioners contend that taxation of their logging income will reduce the value of tribal timber and thereby frustrate the objectives of self-determination and self-government by the Band (Pet. 17-18, 22-23), it is well settled that general policy objectives of that nature are insufficient to give rise to an implied tax exemption. See *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 114 S. Ct. 1439, 1453-1454 (1994); *Dillon* v. *United States*, 792 F.2d 849, 857 (9th Cir. 1986), cert. denied, 480 U.S. 930 (1987); *United States* v. *Anderson*, 625 F.2d 910, 917 (9th Cir. 1980), cert. denied, 450 U.S. 920 (1981); *Fry* v. *United States*, 557 F.2d at 649. Moreover, petitioners fail to recognize (Pet. 22-23) that concerns over tribal self-governance arise in a different context in a federal tax case than in a state tax case, for Congress retains plenary authority over Indian affairs. See *Oklahoma Tax Comm'n* v. *Chickasaw Nation*, 115 S. Ct. at 2220, 2223; *Montana* v. *Blackfeet Tribe*, 471 U.S. at 765; *McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 174-175 (1973).

675 (1912); *Winters* v. *United States*, 207 U.S. 564, 576 (1908). Cf. *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"). As this Court observed in *Choctaw Nation of Indians* v. *United States*, 318 U.S. 423, 432 (1943), "even Indian treaties cannot be rewritten or expanded beyond their clear terms to remedy a claimed injustice or to achieve the asserted understanding of the parties."

Petitioners go well beyond the text of the Treaty of Greeneville in arguing that the intent of Chippewa signatories should be the central element in determining whether the Treaty confers a tax exemption on them (Pet. 8-11, 15). An analysis of the specifics of the treaty language is notably absent both from petitioners' discussion of the treaty (Pet. 15-17) and from the declaration of their expert witness (Pet. App. 45a-79a). Neither petitioners nor their expert witness has offered any affirmative indication that the Indian signatories specifically intended or even desired to bar taxes or other exactions upon income from timber or any other source. They have thus furnished no adequate basis for interpreting a treaty prohibition against "molestation" to mean protection from the ordinary incidents of income taxation that apply to all other citizens.

b. This Court's opinion in *Oklahoma Tax Comm'n* v. *Chickasaw Nation* does not represent a departure from the principle that an income tax exemption for Indians may not be implied but must rest on language reasonably understood to confer the exemption. See *Mescalero Apache Tribe* v. *Jones*, 411 U.S. at 156; *Choteau* v. *Burnet*, 283 U.S. at 696-697; *Squire* v. *Capoeman*, 351 U.S. at 6; *Lazore* v. *Commissioner*, 11

F.3d 1180, 1185 (3d Cir. 1993); *Holt* v. *Commissioner*, 364 F.2d 38, 40 (8th Cir. 1966), cert. denied, 386 U.S. 931 (1967); *Hoptowit* v. *Commissioner*, 709 F.2d 564, 565 (9th Cir. 1983). The Court emphasized in that case that even "liberal construction cannot save the Tribe's claim, which founders on a clear geographic limit in the Treaty." 115 S. Ct. at 2224. Far from undertaking an extended and speculative analysis of the Indian signatories' intent, as petitioners urge should be pursued (Pet. 10-11), the Court succinctly observed that "the purpose of the Treaty was to put distance between the Tribe and the States" and concluded that the signatories "likely gave no thought to a State's authority to tax the income of tribal members living in the State's domain, because they did not expect any members to be there." 115 S. Ct. at 2224.

That is precisely the approach followed by the court of appeals in the present case and in its prior decision in *Jourdain* v. *Commissioner*, 617 F.2d at 509. In construing a treaty provision whose terms are silent on the question of income taxation and whose purpose was, of course, unrelated to income taxation (see *ibid.*), the court of appeals correctly declined to infer the presence of an implied tax exemption that would require an interpretation of the word "molestation" to mean "taxation."

3. Petitioners contend (Pet. 18-22) that the decision below failed to satisfy the ordinary standards for summary judgment. But, once the government established that no treaty or statute contains exemptive language that may reasonably be construed to confer a pertinent tax exemption, it was appropriate for summary judgment to be granted to the government. The disagreement that petitioners have with

the award of summary judgment—and their desire to offer speculative evidence concerning intent, notwithstanding the limited text of the Treaty—relates to the merits of the decisions below, not to the procedures that were followed in reaching those decisions. With respect to the merits of decisions below, and their interpretation of the provisions of the Treaty, there is no conflict among the courts of appeals or other reason to warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1996